Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

-versus-

DETECTIVE JOSEPH CORTESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil rights action, where a jury resolves disputed facts and finds that an arrest is without probable cause, can a reviewing court revisit that factual determination *de novo*, and grant qualified immunity based on the existence of probable cause, contrary to the jury's verdict?[1]

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[1] This Court previously granted a writ of certiorari on a similar issue: whether a jury finding that a constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable. However, that case settled and was dismissed before this Court rendered an opinion. *See, Snyder v. Trepagnier*, 525 U.S. 1098, 119 S.Ct. 863 (1999).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Marshall Spiegel, respectfully prays this Court to issue a Writ of Certiorari to the Seventh Circuit Court of Appeals to resolve the question whether, in a civil rights action, where a jury resolves disputed facts and finds that an arrest is without probable cause, a reviewing court can revisit that factual determination, *de novo*, and grant qualified immunity based on the existence of probable cause, contrary to the jury's verdict.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals that gives rise to this Petition is reprinted in the Appendix at page 1a. The official citation of the Seventh Circuit opinion is *Spiegel v. Cortese*, 196 F.3d 717 (7th Cir. 1999). Additionally, the opinion of the United States District Court for the Northern District of Illinois denying Respondent's Motion for Summary Judgment based on qualified immunity is reprinted in the Appendix at page 19a. The official citation to the District Court opinion denying Respondent's Motion for Summary Judgment is *Spiegel v. Cortese*, 966 F.Supp. 684 (N.D.Ill. 1997). The opinion of the United States District Court for the Northern District of Illinois denying Respondent's Motion to Dismiss on the qualified immunity issue is reprinted in the Appendix at page 38a. The official citation to the District Court opinion denying Respondent's Motion to Dismiss is *Spiegel v. City of Chicago*, 920 F.Supp. 891 (N.D.Ill. 1996).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1254(1). The Seventh Circuit Court of Appeals rendered its decision on November 1, 1999. Petitioner filed a timely Petition for Rehearing and Rehearing En Banc, and the Seventh Circuit denied that Petition on January 14, 2000. This Petition has been filed within 90 days of the denial of Petitioner's Petition for Rehearing and Rehearing En Banc.

CONSTITUTIONAL PROVISION AND STATUTE

This Petition arises out of a lawsuit brought under 42 U.S.C § 1983 against Respondent for violating Petitioner's constitutional right under the Fourth Amendment to be free from an unreasonable arrest that lacked probable cause.

According to 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive

> relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

The Fourth Amendment of the United States Constitution states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Petitioner, Marshall Spiegel, sued Respondent, Chicago Police Detective Joseph Cortese, under 42 U.S.C. § 1983 because Respondent arrested Petitioner without probable cause in violation of the Fourth Amendment.[2] Respondent argued three times before the district court; once on a motion to dismiss, once on a motion for summary judgment and then again on a post-trial motion for judgment as a matter of law, that he was entitled to qualified immunity

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[2]Petitioner also sued several other members of the Chicago Police Department and a member of the Chicago Department of Aging; however, none of those parties are relevant to this Petition.

on the issue of probable cause. However, the judge rejected Respondent's arguments on all three occasions, reasoning primarily that qualified immunity rested on disputed factual issues for the jury to decide. Respondent never filed an interlocutory appeal from the adverse decisions on the motions to dismiss or for summary judgment. After a jury decided these disputed facts and found that Respondent had violated the Fourth Amendment because he arrested Petitioner without probable cause, the district court entered judgment against Respondent.

Only then did Respondent appeal to the Seventh Circuit Court of Appeals, claiming that the district court judge should have granted his post-trial motion for judgment as a matter of law because he was entitled to qualified immunity. The Seventh Circuit agreed and reversed the district court's judgment against Respondent, holding that Respondent was entitled to qualified immunity. In doing so, the Seventh Circuit conducted a *de novo* review of the probable cause issue, including the disputed facts, despite the fact that the jury had already resolved these matters in Petitioner's favor. The Seventh Circuit replaced the jury's verdict and resolution of the facts with its own completely contrary judgment.

The events giving rise to this case involve a dispute over excessive noise at the Hollywood Towers high-rise residential complex in Chicago, Illinois on May 29, 1993.[3] Petitioner and his family had been renting a unit on the floor directly below Loren Cherny and Mim Bobin. For months,

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[3]Hollywood Towers is actually a condominium complex, but at the time Petitioner, as well as Cherny and Bobin, were renting their respective units from the condominium owners.

Petitioner had been complaining to the condominium association that Cherny and Bobin were making excessive noise. Nothing was done to stop the noise. On May 29, at about 6 p.m., Petitioner's wife, Carol, was awakened from a nap by the noise upstairs and went up to complain to Bobin and Cherny. Soon Petitioner, who was holding his seventeen month-old son, arrived and overheard Cherny and Bobin screaming at his wife. Petitioner joined his wife in complaining that Cherny and Bobin were making too much noise. Cherny responded "tough," stepped toward him, and shoved Petitioner in the chest. Then the doorman appeared and broke up the confrontation. Shortly after the doorman broke up the confrontation, and as Petitioner and his wife were leaving via the stairwell, Bobin accosted Petitioner and shoved him.

Two days later, on May 31, 1993, Petitioner went to the Chicago Police Department and filed a police report stating that Bobin and Cherny had shoved him during the confrontation. However, Petitioner did not want the police to go to his neighbors' home and arrest them. The police told Petitioner he could have a summons issued that would direct Cherny and Bobin to go to court to answer the charges. On June 21, Petitioner went to the police station, filed battery charges against Cherny and Bobin, and requested that summons issue. The summons was mailed to Cherny and Bobin directing them to come to court to answer the charges.

On June 25, Cherny and Bobin went to the police station and, for the first time, in retaliation for Petitioner having filed charges against them, filed a battery charge against Petitioner. Respondent, Detective Cortese, was assigned to investigate the case. Cherny told Respondent that

Petitioner had confronted him and backed him up against a wall. Cherny claimed Petitioner dared Cherny to hit him, and then that Petitioner kneed Cherny on the inner thigh. Cherny also brought a report he filed with the condominium association, and showed Respondent a bruise, which apparently had not healed at all in the month that had elapsed. In the report Cherny filed with the condominium association shortly after the altercation, he failed to mention any physical blow or attack by Petitioner.

Respondent then spoke with Petitioner on the telephone. Petitioner informed Respondent that he did not knee Cherny. Petitioner also told Respondent that, in fact, he had filed charges against Cherny and Bobin just two days earlier, and that their charge was filed in retaliation. Petitioner informed Respondent he could provide corroborating witnesses who would testify that Petitioner never kneed Cherny. In spite of this information, Respondent gave Petitioner his Miranda warnings over the phone and ordered him to come to the police station that same day. When he did, Petitioner was arrested for battery, but he was subsequently acquitted after a trial in Illinois state court. He then filed the case at bar.

ARGUMENT FOR GRANTING THE WRIT

THE CASE AT BAR ADDS TO A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER, WHERE A JURY RESOLVES DISPUTED FACTS AND FINDS THAT AN ARREST IS WITHOUT PROBABLE CAUSE, A REVIEWING COURT CAN REVISIT THAT FACTUAL DETERMINATION, *DE NOVO*, AND GRANT QUALIFIED IMMUNITY BASED UPON THE

EXISTENCE OF PROBABLE CAUSE, CONTRARY TO THE JURY'S VERDICT.

A. Introduction

The Seventh Circuit Court of Appeals erred in granting Respondent qualified immunity based upon its conclusion that there was probable cause to arrest Petitioner. Once the jury made its factual findings and determined that there was no probable cause to arrest Petitioner, the reviewing court could not revisit that determination *de novo*, and simply substitute its own conclusion for the jury's verdict. The Court of Appeals was under an obligation to defer to the jury's factual findings, and at the very least should have considered all of the evidence in the light most favorable to Petitioner.

Instead, the Seventh Circuit simply disagreed with the jury and merely substituted its own judgment for that of the jury on the facts of the case. This is apparent from the opinion, which describes the "core issue" as "whether qualified immunity shields a police officer who concludes that there is probable cause to arrest a suspect based on a putative victim's allegations that the suspect denies." *Spiegel*, 196 F.3d at 720. The Seventh Circuit answered that question in this manner:

> Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and his account of the escalating conflict with Spiegel together provide ample grounds for Cortese to believe that Spiegel had committed a battery.

Id. at 724.

Nowhere in the Seventh Circuit's reasoning is there even a passing reference to the fact that the jury resolved these matters in Petitioner's favor, let alone deference to the jury's verdict.

The decision of the Court of Appeals is contrary to prior Seventh Circuit caselaw, and contradicts the caselaw of other circuits.[4] This Court should issue a writ of certiorari to resolve this question and settle the law in this area. The Court of Appeals completely ignored the jury's factual findings which governed the resolution of the qualified immunity issue. In applying a standard of objective reasonableness, the jury found that a reasonable officer could not have believed there was probable cause to arrest Petitioner.[5] The Court of Appeals was wrong when it ignored that verdict and replaced the jury's factual findings with its own.

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[4]In *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), the Fifth Circuit stated that "[t]here is no inherent conflict between a finding of excessive force and a finding of qualified immunity." *Id.* at 800. However, the Fifth Circuit expressly noted there is a conflict among the Circuits on this issue. *Id.* at 801, n. 10.

[5]The jury was instructed that, "[t]he test for probable cause to arrest is whether a reasonable and prudent man, in possession of the knowledge that has come to the arresting officer, would believe the person arrested may be guilty of an offense. It is something less than the evidence that would result in conviction, it may be founded on hearsay evidence and should be based upon the factual and practical considerations of everyday life upon which reasonable and prudent men act."

B. Qualified Immunity

Whether a defendant is entitled to qualified immunity is an issue the court considers *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023 (1994). While the qualified immunity defense is determined by the court as a matter of law, a jury decides disputed factual issues relevant to that determination. *Karnes v. Skrutski*, 62 F.3d 485 (3d Cir. 1995). In assessing the qualified immunity defense, the court must determine 1) whether the constitutional right was clearly established, and 2) whether a reasonable officer could have believed his conduct was lawful in light of the clearly established law and the information he possessed at the time of the arrest. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040 (1987). The first part of the test is purely a question of law, but the second prong requires application of the law to the particular conduct at issue, an inquiry which requires factual determinations if the nature of the conduct is disputed. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). This inquiry is an objective fact-specific pursuit. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040. In determining whether the trial evidence is sufficient to support a verdict on a motion for judgment as a matter of law, the court is to view the evidence in the light most favorable to the verdict, resolving any conflicts in the evidence in favor of the party obtaining the verdict and granting him the benefit of all reasonable inferences. *Frazell v. Flanigan*, 102 F.3d 877, 882 (7th Cir. 1996).

There is no dispute that the constitutional right to be free from arrest without probable cause was clearly established at the time Petitioner was arrested in 1993, as even the Seventh Circuit admitted in its ruling. *Spiegel*, 196

F.3d at 723; *see also*, *Jenkins v. Keating*, 147 F.3d 577, 585 (7th Cir. 1998). Thus the only issue left for the Seventh Circuit was whether a reasonable officer could have believed that his conduct was lawful in light of the clearly established law and information Respondent possessed at the time of the arrest: this question necessarily mixes law and fact.

C. Seventh Circuit Caselaw

While this Court has not yet decided whether a jury's finding of no probable cause to arrest forecloses a finding of qualified immunity, the Seventh Circuit confronted the substance of the issue in 1996. *See*, *Frazell*, 102 F.3d 877. In *Frazell*, the Seventh Circuit was faced with an almost identical question: whether the jury's findings in an excessive force case foreclosed the defendant's qualified immunity defense. The plaintiff in *Frazell* sued several police officers under § 1983 for using unreasonable force in effecting an arrest, in violation of the Fourth Amendment. *Frazell*, 102 F.3d at 885. Procedurally, *Frazell* is identical to the case at bar. After a jury trial, the district court denied defendant's motion for judgment as a matter of law based upon his claim of qualified immunity and the defendant appealed. *Id.* at 878. The *Frazell* court found the standard of review for qualified immunity was *de novo*; however, that review should defer to the jury's resolution of disputed factual issues. *Frazell*, 102 F.3d at 886. The Court stated:

> [t]he instant case is somewhat unique, however, in that a jury already has determined that the force applied by Trooper Flanigan and the other officers was objectively unreasonable under the circumstances. *At the*

> *very least, we are bound by the jury's resolution of disputed factual issues in assessing Flanigan's immunity defense.*

Id. (emphasis added).

The Court of Appeals reasoned that a jury's verdict on the Fourth Amendment question effectively resolves the immunity issue as well, because both questions turn on whether the officer's conduct was objectively reasonable under the circumstances. *Id.* Once the jury determines the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed his conduct was lawful. *Id.* The Seventh Circuit held that the jury's finding that excessive force was used "logically disposes" of the qualified immunity question. *Id.* at 887. Thus the decision in the case at bar conflicts with *Frazell*.

Support for *Frazell* is found in *Maxwell v. City of Indianapolis*, 998 F.2d 431 (7th Cir. 1993). *Maxwell* was decided in the context of a motion for summary judgment; however, the issue in *Maxwell*, whether the officers were entitled to qualified immunity based on the issue of probable cause, is directly relevant to *Frazell* and to the case at bar. *Id.* at 433. The plaintiff in *Maxwell* sued several police officers under § 1983 for arresting him without probable cause. *Id.* The defendants moved for summary judgment on the issue of qualified immunity. The district court denied the motion, and the defendants appealed. *Id.* In affirming the district court's denial of the motion, the Court of Appeals found that:

> Normally this decision [probable cause] occurs in the context of a motion to suppress evidence, which requires a judge to review both law and fact and to decide when conduct exceeds the bounds of reasonableness. On the other hand, if the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them. Accordingly, a conclusion that probable cause existed as a matter of law is appropriate only when no reasonable jury could find that officers did not have probable cause to arrest Maxwell.

Id. at 434.

The question of probable cause in the case at bar was also a factual one, properly answered by the jury. However, there remains the question whether a reasonable officer could have believed his actions were lawful. *Maxwell* addresses this question as well, explaining that:

> *The rub here lies in the substantial, if not complete, overlap of the issue of immunity and the principal issue on the merits..* Because we have already established that the conclusion by the three officers concerning the existence of probable cause may be found to be objectively unreasonable, they are not entitled to qualified immunity at this juncture.

Id. at 436-36. (emphasis added).

The overlap in the question of objectively reasonable conduct and qualified immunity applies to the case at bar and supports the *Frazell* holding that answering one resolves the other. Once the jury found, in the case at bar, that the defendant's conduct was objectively unreasonable, it would defy logic to find that a reasonable officer could believe that his actions were lawful. A reviewing court cannot then untie the jury's resolution of the disputed facts, a resolution that favored Petitioner, and enter a contrary judgment on a *de novo* review of the same facts.

D. Caselaw From Other Circuits

Frazeli is supported by caselaw in other circuits. The Ninth Circuit reviewed the same issue, whether the jury's resolution of disputed facts foreclosed qualified immunity, in *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996). The plaintiff in *Acosta* sued under § 1983 for the use of excessive force in shooting and killing her son when the defendant police officer attempted to arrest him. 83 F.3d at 1144. The jury heard the evidence and returned a verdict in favor of the plaintiff. *Id.* at 1145. The defendant then moved for judgment as a matter of law based on qualified immunity. The district court granted that motion and entered judgment for the defendant. *Id.* In reversing the district court's order, the Ninth Circuit stated:

> Instead of relying on the factual findings implicit in the jury's verdict in favor of the Acostas, the district court granted Yawczak

> qualified immunity based on its own factual findings. The Acostas argue that regardless of whether it is the judge or the jury who makes the ultimate determination on the issue of qualified immunity, that decision-maker must rely on the jury's factual findings as to the disputed issues of fact. They are correct. *Regardless of who makes the ultimate determination as to qualified immunity, the jury, not the judge, must decide the "foundational" or "historical" facts that underlie the determination.*

83 F.3d at 1147. (emphasis added).

The *Acosta* court went on to hold that, for the jury to reach its verdict, it had to find that it was objectively unreasonable for the defendant police officer to fire the deadly shot:

> A review of the record reveals that it is highly likely that the jury developed serious doubts regarding Yawczak's veracity... In short, in order to reach its verdict, the jury must have found that at the moment Yawczak fired the deadly shot, it was not reasonable for him to believe that Acosta posed a threat of great bodily injury or harm to him or anyone else.

Id. at 1148.

In accepting the jury's resolution of the facts, the Ninth Circuit held that it could not be objectively reasonable

for the defendant to believe he was acting lawfully, and therefore he was not entitled to qualified immunity. *Id.*

The Second Circuit has also held that, where a jury resolves the disputed facts relevant to qualified immunity, the court must accept those facts in determining whether the defendants are entitled to qualified immunity. *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991). The plaintiff in *Posr* sued the defendant police officer under § 1983 for, among other things, using excessive force during an arrest. *Id.* at 95. After the jury returned a verdict in favor of the plaintiff, the defendants moved for judgment as a matter of law based on qualified immunity. They argued that, as a matter of law, it was objectively reasonable for them to believe that their treatment of the plaintiff did not violate his constitutional rights. *Id.* at 96. As the *Posr* court explained:

> The problem with this argument is that it depends on the officers' version of the facts – *a version the jury plainly rejected.* Whether the officers reasonably believed that their use of force was not excessive was properly a jury issue. *By its verdict, the jury found against the defendants on this prong of the qualified immunity defense and we find no basis for disturbing this finding.*

944 F.2d at 95-96. (emphasis added).

In a similar holding, the Third Circuit held that the defendants could not prevail on qualified immunity because there were factual issues to be decided by the jury directly relevant to the question. *Karnes v. Skrutski*, *supra*.. The

plaintiff in *Karnes* sued the defendant police officers under § 1983 because they detained him for an unreasonable amount of time during a routine traffic stop and searched his car without probable cause. 62 F.3d at 488. After both sides had presented evidence to the jury, but before the jury rendered a verdict, the defendants moved for judgment as a matter of law on the basis of qualified immunity. The defendants claimed the plaintiff fit the profile for a drug courier and therefore they were justified in the *Terry* stop, the detention, and the car search. *Id.* at 489. The district court granted qualified immunity on the traffic stop and the detention, but denied the motion on the car search, since the issue of probable cause rested on disputed facts, and "a jury should decide disputed factual issues relevant to that determination." *Id.* at 491.

On appeal, the Third Circuit held that all three issues should have been resolved by the jury. *Id.* at 500. The court held that, while qualified immunity is ordinarily determined by courts as a matter of law, a jury should decide disputed factual disputes relevant to that determination. *Id.* at 491. *Karnes* is different from the issue at bar because the judge granted the defendants' motion for a judgment as a matter of law on portions of the case before the jury could render a verdict. Thus, the *Karnes* court was deciding whether the jury *should* resolve the factual disputes relevant to qualified immunity. However, it is implicit in the Third Circuit's reasoning that once the jury does resolve the factual disputes underlying the question of qualified immunity, then the court deciding the qualified immunity question must defer to the jury's resolution of the disputed facts.

In a consistent holding, the Tenth Circuit has held that once the jury determines that the defendant officer's conduct was objectively unreasonable, the question of qualified immunity is effectively answered. *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991). The jury in *Street* answered two special interrogatories: 1) whether the defendant was liable because his use of force was objectively reasonable; and 2) whether the defendant was entitled to qualified immunity because a reasonable officer in the defendant's shoes would have believed this conduct to be lawful. *Id.* at 538-39. The jury answered both interrogatories in the affirmative. The defendant subsequently moved for a judgment notwithstanding the verdict based qualified immunity. *Id.* The district court granted the motion, but the Tenth Circuit reversed. The Court of Appeals held that the answer to the liability question effectively resolved the qualified immunity question because they are both based on the same standard. *Id.* at 541. The Tenth Circuit explained that:

> [o]nce the jury concluded that, even under all the circumstances, excessive force had been used, the inquiry was over. *This is one of the rare instances where the determination of liability and the availability of qualified immunity depend on the same findings.* The qualified immunity question was answered as part of the jury's excessive force claim. Because a reasonable police officer would not have believed that the use of unreasonable force was necessary under the circumstances, the jury's affirmative answer to [the liability] instruction answered the qualified immunity question.

Id. at 540-41. (emphasis added).

Street is relevant to the case at bar. Once the jury, applying an objective reasonableness standard, finds that the defendant acted unreasonably, there is no more inquiry as to qualified immunity by the jury, the judge or a reviewing court. The question of whether the officers are entitled to qualified immunity overlaps with whether the officers were objectively reasonable in their actions. When the jury answers the latter, it necessarily answers the former. This is so because the same standard applies to both questions, and it would be logically inconsistent to find in the affirmative on both liability and qualified immunity.

E. Nature Of The Conflict

The approach used by the Seventh Circuit in the case at bar to resolve the issue of qualified immunity is completely at odds with the correct method exemplified by the other cases set forth above. The Seventh Circuit should have deferred to the jury's resolution of the factual issues underlying the qualified immunity question. Instead, the Court of Appeals ignored the jury's verdict and re-weighed the evidence, substituting its own judgment for that of the jury. Simply put, once the jury renders a verdict, a reviewing court is bound by the jury's resolution of the disputed factual issues in assessing the defendant's qualified immunity claim.

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for a Writ of Certiorari on the question of

whether, in a civil rights action, where a jury resolves disputed facts and finds that an arrest is without probable cause, a reviewing court can revisit that factual determination, *de novo*, and grant qualified immunity based on the existence of probable cause, contrary to the jury's verdict.

Respectfully submitted,

_____

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(Any footnotes trail end of each document)

Marshall Spiegel, Plaintiff-Appellee, Cross-Appellant, v. Joseph Cortese, Detective, Defendant-Appellant, and James Hennelly and Holly Zielke, Defendants, Cross-Appellees.

Nos. 97-4113, 97-4236 & 98-1790

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 34978

January 20, 1999, Argued

November 1, 1999, Decided

SUBSEQUENT HISTORY:

[*1] As Amended January 7, 2000. Rehearing Denied Janaury 14, 2000, Reported at: *2000 U.S. App. LEXIS 578.*

PRIOR HISTORY:

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 3697. Ruben Castillo, Judge.

DISPOSITION:

District court's judgment against Cortese REVERSED. As to the cross-appeal, the judgment dismissing the claims against Hennelly and Zielke, and the conspiracy claim, the district court's judgments AFFIRMED.

COUNSEL:

For MARSHALL SPIEGAL, Plaintiff - Appellee (97-4113): G. Flint Taylor, PEOPLE'S LAW OFFICE, Chicago, IL USA. David C. Thomas, CHICAGO-KENT COLLEGE OF LAW, Chicago, IL USA.

For JOSEPH CORTESE, Detective # 20868, Defendant - Appellant (97-4113): Jean Dobrer, Benna R. Solomon, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, IL USA.

For MARSHALL SPIEGEL, Plaintiff - Appellant (97-4236): G. Flint Taylor, PEOPLE'S LAW OFFICE, Chicago, IL USA. David C. Thomas, CHICAGO-KENT COLLEGE OF LAW, Chicago, IL USA.

For CITY OF CHICAGO, Defendant - Appellee (97-4236): Benna R. Solomon, Susan S. Sher, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, IL USA.

For JOSEPH CORTESE, JAMES HENNELLY, DENNIS MURPHY. Defendants **[*2]** - Appellees (97-4236): Benna R. Solomon, Susan S. Sher, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, IL USA. James P. McCarthy, Law Department, Chicago, IL USA.

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For JOSEPH CORTESE, # 20868, Defendant - Appellant (98-1790): Jean Dobrer, Benna R. Solomon, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, IL USA.

JUDGES:
Before Coffey, Ripple, and Kanne, Circuit Judges.

OPINIONBY:
COFFEY

OPINION:

Coffey, *Circuit Judge*. Marshall Spiegel sued Detective Joseph Cortese, four other City of Chicago police officers, an employee of the City's Department of Aging (collectively, the "individual defendants") and the City of Chicago under *42 U.S.C. § 1983*, alleging that the individual defendants arrested him without probable cause in violation of the Fourth Amendment and that the arrest **[*3]** was conducted pursuant to an unconstitutional official policy or custom. The district court previously dismissed Spiegel's claims against three of the officers and the employee from the city's Department of Aging, holding that the four were not personally involved in Spiegel's arrest. Cortese argued at three separate stages in the case that qualified immunity shielded him from liability, but the district court rejected his argument, and, after a jury trial, entered judgment against him. Thus Cortese only appeals the district court's decision, arguing that the trial judge should have granted his post-trial motion for judgment as a matter of law because he was entitled to qualified immunity. Spiegel cross-appeals, arguing that the district court erred in dismissing the claims against the individual defendants other than Cortese and another

police officer. The core issue in this appeal is whether qualified immunity shields a police officer who concludes that there is probable cause to arrest a suspect based on a putative victim's allegations that the suspect denies. Because we hold that qualified immunity applies in such a case, we reverse the judgment of the district court. As to Spiegel's **[*4]** cross-appeal, we affirm.

This lawsuit has its roots in an altercation between neighbors over noise at Hollywood Towers, a high-rise apartment complex in Chicago, Illinois. In January 1993, Loren Cherny and Min Bobin, then 73 and 74 years old, respectively, began renting an apartment directly above the apartment occupied by Spiegel and his wife Carol, who at the time were 36 and 42 years old, respectively. Soon after Cherny and Bobin moved in, the Spiegels began accusing them of making too much noise. Cherny and Bobin denied the accusations, but the Spiegels persisted in their accusations until Cherny and Bobin asked the condominium association to intervene and halt what they believed were excessive complaints by the Spiegels. The condominium association investigated the dispute and ultimately concluded that the Spiegels' complaints were unfounded.

Around 6 p.m. on May 29, 1993, Carol Spiegel confronted Cherny and Bobin in front of their apartment, complaining that noise from their apartment prevented her from taking a nap. Shortly thereafter, Marshall Spiegel appeared in the hallway, about 10 feet away from Cherny and Bobin, carrying his seventeen-month-old son. Spiegel backed Cherny **[*5]** against a wall and yelled, "come on, hit me, you old fart." At that time Spiegel kneed him, bruising Cherny's upper thigh.

Spiegel recalled the altercation differently. He asserted that when he arrived with his son, he overheard Cherny and Bobin screaming at his wife, and he complained that Cherny and Bobin had been making too much noise. According to

Spiegel, Cherny responded, "tough," stepped toward him and shoved Spiegel's chest with both his hands, and Bobin also shoved him. The doorman subsequently appeared and broke up the confrontation, returning the Spiegels to their apartment.

On May 31, 1993, Spiegel went to the police department and filed a police report alleging that both Bobin and Cherny had shoved him during the May 29th confrontation. Although the officer interviewing him filed a report based on the incident, he advised Spiegel to wait a few weeks and then request a summons against Cherny and Bobin at the warrant office. Spiegel accordingly on June 21 went to the warrant office and advised Sergeant Kajari, a City of Chicago police detective, that he wanted to file charges against Cherny and Bobin. Two days later, he returned to the office and obtained a summons against **[*6]** Cherny and Bobin for battery. On June 25, Cherny and Bobin went to the same police station to file their own report based on the May 29th incident and were interviewed by Detective Cortese, whom Sergeant Kajari assigned to investigate the report. Detective James Hennelly also was present during the interview. Cherny and Bobin told Cortese and Hennelly that on May 29, Carol Spiegel knocked on their door around 6 p.m., and when they opened it, she began yelling about noise from their apartment. Cherny and Bobin further claimed that when Marshall Spiegel joined the altercation, he backed Cherny against a wall, dared Cherny to hit him and then kneed Cherny in the inner thigh. Cherny gave Cortese photographs of his bruised thigh, a report summarizing the incident that he filed with the condominium association and then showed Cortese the actual bruise.

Later the same day, Cortese reviewed the May 31st police report and documents Cherny and Bobin had provided relating to complaints both parties lodged with the condominium association after the altercation. In one complaint dated June 1, 1993, Cherny omitted mention of

any physical blow by Spiegel. On June 25, Cortese called the [*7] Spiegels, spoke with Carol Spiegel and informed her that he needed to speak to her husband as soon as possible but did not see fit to question Carol at this time about the May 29th altercation. When Marshall Spiegel returned Cortese's call, Cortese told him that Cherny and Bobin had filed a battery charge against him and that he was subject to arrest and that he should report to the police station. Spiegel responded that he had filed charges against Cherny and Bobin two days earlier, and insisted that their charge against him was retaliatory. He further asserted that Cherny and Bobin had shoved him, that he had not physically attacked them and that he had corroborating witnesses, although he did not identify them. He also told Cortese that Cherny and Bobin had reported to the Illinois Department of Child and Family Services that he had used his child as a shield during the confrontation. Cortese gave Spiegel his *Miranda* warnings over the phone and advised him to retain an attorney. During the same phone call Spiegel spoke with Sergeant Kajari, and repeated his conversation with Cortese to him. Kajari advised Spiegel that he would not interfere with Cortese's investigation. After [*8] he retained an attorney, Spiegel followed Cortese's directive and reported to the police station, where he was arrested for battery. He was subsequently prosecuted for battery in Illinois state court and was acquitted of the charge after a jury trial.

In June 1995, Spiegel filed this action against the City of Chicago and five Chicago police officers--Detectives Cortese and Hennelly, Captain Brannigan, Sergeant Murphy and Sergeant Kajari. Spiegel alleged that: (1) his June 25, 1993 arrest violated the Fourth Amendment because it was not supported by probable cause; (2) the individual defendants conspired to deprive him of his Fourth Amendment rights; (3) the Fourth Amendment violation was carried out pursuant to an official policy or custom; and (4) the City was liable for any damages that might be assessed against the individual

defendants based on the alleged unlawful arrest. Spiegel subsequently amended his complaint to add a claim against Holly Zielke, an employee of the City of Chicago's Department of Aging, alleging that she conducted a biased investigation (although the complaint does not specify how she became involved) and urged Cherny and Bobin to charge Spiegel, and urged **[*9]** the individual defendants to arrest him.

The individual defendants thereafter moved to dismiss the action, contending that Spiegel's arrest was supported by probable cause, and furthermore that the defendant-officers were entitled to qualified immunity; that Zielke was not responsible for any actions challenged by Spiegel; that Spiegel's detention was not excessive; and that Spiegel's allegations of a "conspiracy" to deprive him of constitutional rights were not supported in the record. The City filed a separate motion to dismiss, arguing that Spiegel's arrest was lawful and that the claim seeking to hold it liable for any damages assessed against any of the individual defendants was premature because no defendant had as yet been adjudged liable.

The district court granted the defendants' motion to dismiss the claims against Hennelly, Brannigan, Murphy and Zielke, holding that they were not responsible for the decision to arrest Spiegel, and also dismissed the conspiracy claim and the two claims against the City of Chicago, holding that Spiegel had inadequately alleged a conspiratorial agreement, that Spiegel's arrest was not the result of an unconstitutional policy or **[*10]** custom and that the pre-judgment respondeat superior claim against the City was premature. The court denied the motion as to the claims against Cortese and Kajari, holding that Spiegel had stated a claim based on the detectives' alleged failure to further investigate the charge against Spiegel once Spiegel had questioned the credibility of Cherny and Bobin.

In July 1996, Cortese and Kajari made a $ 5,001 offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure that included a disclaimer of liability. After Spiegel rejected the offer, Cortese and Kajari moved for summary judgment, again arguing that qualified immunity applied to the decision to arrest Spiegel. The district court denied the motion, ruling that a genuine issue of material fact existed as to whether a reasonable officer would have concluded that there was probable cause to arrest Spiegel based on Cherny's and Bobin's report, given that Spiegel had insisted that the charge was bogus. In particular, the court noted that it was undisputed that Cortese never attempted to verify Cherny's and Bobin's account, to interview witnesses to the dispute or to investigate Spiegel's accusations that both Cherny **[*11]** and Bobin had shoved him and filed a false charge against him.

The case proceeded to trial, at which Cherny, Spiegel, Cortese and Kajari testified about the altercation, the investigation and Spiegel's arrest. Spiegel also called Hanan Hughes, who lived on the same floor as Cherny and Bobin. Hughes testified that she observed the confrontation from her apartment, and at one point stepped into the hallway and asked whether everything was all right. She further testified that both the Spiegels as well as Cherny and Bobin were yelling, and that she saw Cherny shove Spiegel and exclaim, "you shouldn't have tried to kick me." She noted that she did not see Spiegel kick or knee Cherny, but admitted that the two were at one point standing close together such that Spiegel was blocking her view of Cherny.

The jury returned a verdict against Cortese in the amount of $ 5,000 "on his claim that his constitutional rights [sic] to be free from unreasonable arrest were violated." Cortese then moved for judgment as a matter of law, arguing a third time that he was entitled to qualified immunity, and sought a remittitur in the amount of the $ 5,000 judgment against him. The district court denied **[*12]** the motion, and Spiegel

moved for a determination that he did not owe the costs Cortese had incurred in light of the fact that Cortese had made a $ 5,001 offer of judgment under Fed. R. Civ. P. 68, arguing that because the offer included a disclaimer of liability, it was less favorable than the $ 5,000 judgment he obtained. After the parties briefed the issue, the district court agreed that the disclaimer rendered less favorable the offer of judgment, and accordingly declined to award Cortese costs under Rule 68. Spiegel also moved for an award of attorneys' fees and costs as a "prevailing party" under *42 U.S.C. § 1988*, and the district court subsequently awarded him attorneys' fees of $ 129,700 and costs of $ 5,787.38.

Cortese's appeal primarily challenges the district court's ruling that qualified immunity did not apply to his decision to arrest Spiegel. In addition, Cortese argues that the district court erred in denying him costs under Fed. R. Civ. P. 68 and in allowing the jury award to stand. In his cross-appeal Spiegel contends that the district court erred in dismissing his claims against Hennelly and Zielke.

[*13] We review de novo the district court's finding that Cortese was not entitled to qualified immunity. *See Humphrey v. Staszak, 148 F.3d 719, 725 (7th Cir. 1998)*. Qualified immunity shields from liability government officials who are performing discretionary functions in the course of duty to the extent that their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Eversole v. Steele, 59 F.3d 710, 717 (7th Cir. 1995)* (internal quotation marks and citations omitted). In determining whether qualified immunity applies, this court considers: "(1) whether the plaintiff has asserted a violation of a federal constitutional right, and (2) whether the constitutional standards implicated were clearly established at the time in question." *Id.* Although qualified immunity is a defense to a § 1983 suit, the burden of meeting the elements of this two-part test rests on the plaintiff. *See id.*

It is undisputed that the constitutional **[*14]** right to be free from arrest without probable cause was clearly established at the time Spiegel was arrested in 1993. *See Jenkins v. Keating, 147 F.3d 577, 585 (7th Cir. 1998)* (noting that this right was clearly established by at least 1991). Because qualified immunity protects all "but the plainly incompetent or those who knowingly violate the law," a law enforcement officer will be immune to claims based on an arrest without probable cause unless "it is obvious that no reasonably competent officer" would have believed that there was probable cause to arrest. *Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).* Thus, qualified immunity applies not only to those officials who correctly determine that probable cause to arrest exists, but also to those governmental officials who reasonably but mistakenly conclude that it does. *See Hunter v. Bryant, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991).* In this context, the law tolerates reasonable error because "officials should not err always on the side of caution **[*15]** because they fear being sued." *Id. at 229* (internal quotation marks and citation omitted). Probable cause is itself "a commonsense determination, measured under a reasonableness standard," *Tangwall v. Stuckey, 135 F 3d 510, 519 (7th Cir. 1998),* and is present if at the time of arrest "the facts and circumstances within [the arresting officer's] knowledge and of which she has reasonably trustworthy information would warrant a prudent person in believing that the suspect had committed or was committing an offense." *Qian v. Kautz, 168 F.3d 949, 953 (7th Cir. 1999).* The existence of probable cause turns on the information known to the officers at the moment the arrest is made, not on subsequently received information. *See Hebron v. Touhy, 18 F.3d 421, 423 (7th Cir. 1994).* Consequently, "as long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable **[*16]** cause to place the alleged culprit under arrest, and their actions will be cloaked with

qualified immunity if the arrestee is later found innocent." *Jenkins, 147 F.3d at 585.* Thus, the reviewing court should ask whether an official "acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed several years after the fact." *Humphrey, 148 F.3d at 725.* Moreover, this court has emphasized that once probable cause has been established, officials have "no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." *Eversole, 59 F.3d at 718* (internal quotation marks and citation omitted).

In light of these standards, we disagree with the district court's conclusion that Cortese is not immune to Spiegel's claims. In Illinois, a person commits a battery when he: (1) intentionally or knowingly without legal justification (2) causes bodily harm to another or makes physical contact of an insulting **[*17]** or provoking nature with another. 720 Ill. Comp. Stat. Ann. 5/12-3(a). Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and his account of the escalating conflict with Spiegel together provided ample grounds for Cortese to believe that Spiegel had committed a battery. Although Spiegel contends that further investigation would have revealed that Cherny's charges were retaliatory, it is well-established that "'when an officer has received . . . information from some person--normally the putative victim or an eye witness--who it seems reasonable to believe is telling the truth, he has probable cause.'" *Tangwall, 135 F.3d at 519* (quoting *Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 439 (7th Cir. 1986)).*

Spiegel nonetheless contends that because a host of inconsistencies marred Cherny's and Bobin's report, a reasonable officer would not have relied on it. He asserts in particular that Cortese knew that: (a) there was a longstanding dispute between Cherny and Spiegel; (b) Cherny had filed numerous **[*18]** charges against Spiegel,

including one with DCFS; (c) Cherny had contradicted himself in his report, claiming at different points during the same interview that Spiegel had kneed him in the groin, kicked him in the thigh and had attempted to kick him "in the balls" but missed; (d) Cherny's report that he was battered is inconsistent with the written account of the incident Cherny prepared for the condominium association that did not mention a physical attack; (e) Cherny had admitted that he had shoved Spiegel during the incident; (f) Cherny filed his charge nearly a month after the altercation, but two days after Spiegel had filed his charges against Cherny and Bobin; and (g) the photograph of Cherny's bruise, purportedly taken near the time of the dispute, and the bruise that Cherny showed Cortese during the interview appeared the same even though nearly a month had elapsed.

We do not agree with Spiegel that these purported facts would have caused a reasonable officer to take further investigative steps. While the lengthy and ongoing dispute culminating in the altercation and the other charges Cherny had filed might tend to establish Cherny's bias, these facts do not render Cherny's **[*19]** report incredible as a matter of law. We are also of the opinion that Spiegel's other arguments are either irrelevant, such as the condition of Cherny's bruise almost a month after the alleged battery, or insignificant, such as Cherny's varying accounts of how exactly Spiegel struck him. More importantly, no clearly established precedent required Cortese to resolve these inconsistencies before arresting Spiegel. Of course it is true that where "information from or about a [putative] victim of crime would lead a reasonable officer to be suspicious," the officer should conduct further investigation. *Hebron, 18 F.3d at 422-23.* But police officers need not exclude every suggestion that a victim is not telling the truth. Many putative defendants protest their innocence, and it is not the responsibility of law enforcement officials to test such claims once probable cause has been established. n1 Consequently,

"the law does not require that a police officer conduct an incredibly **[*20]** detailed investigation at the probable cause stage." *Gerald M. v. Conneely, 858 F.2d 378, 381 (7th Cir. 1988).* Accordingly, "the inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation." *Kelley, 149 F.3d 641 at 647.* Nothing suggests that a victim's report must be unfailingly consistent to provide probable cause. The credibility of a putative victim or witness is a question, not for police officers in the discharge of their considerable duties, but for the jury in a criminal trial. *Cf. Hebron, 18 F.3d at 423* (noting that police "are entitled to act on the basis of observable events and let courts resolve conflicts about mental states"). We refuse to require law enforcement officers to delay arresting a suspect until after they have conclusively resolved each and every inconsistency or contradiction in a victim's account.

Next, Spiegel contends that Cortese had a duty to interview available witnesses, including in particular Hanan Hughes, who would have cast doubt on the reliability of Cherny's and Bobin's complaint. This argument fails because the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

Gramenos, 797 F.2d at 442. Again, once probable cause is established as to each element of an offense, an arrest is lawful. Moreover, we note that it is far from clear that

interviewing Hughes or even Carol Spiegel would have undermined Cortese's determination that he had probable cause to arrest Spiegel. Carol Spiegel obviously was biased, and although Hughes testified that she did not **[*22]** see Spiegel strike Cherny, she also testified that she heard Cherny exclaim that Spiegel should not have tried to kick him.

Spiegel nonetheless points to a number of cases that, he contends, establish that further investigation is required before a suspect may be arrested on the report of a victim whose credibility has been put into question. We disagree with Spiegel's reading of these cases. While in *Gramenos* we cautioned that "a prudent officer may balk" at a witness who describes a crime occurring "long ago" or who is "babbling or inconsistent," *Gramenos, 797 F.2d at 439,* more relevant is the holding in Gramenos that a security guard's report of a theft, which the suspect vehemently denied, provided probable cause, even though additional witnesses were available but not interviewed. Likewise, our admonition in *Hebron, 18 F.3d at 423,* that a report of "questionable reliability" dictates further investigation is less significant for current purposes than our holding there that police officers are entitled to act "on the basis of observable events," and that credibility disputes are left for the jury. Id. Cortese observed a bruise in the area **[*23]** where Cherny said Spiegel had struck him, as well as the demeanors of two elderly victims who claimed they were frightened of Spiegel, and reasonably concluded that a battery had been committed.

Rather, this case is more closely analogous to Gerald M. In that case, three children of two feuding families were involved in a confrontation. A police officer detained two of the boys solely on the basis of a report by the third boy that the two had assaulted him and stolen his bicycle. The plaintiffs brought a § 1983 claim, alleging that their detention was not supported by probable cause and was therefore unconstitutional. In affirming a grant of summary

judgment for the officer, we stressed that the report of a victim "who it seems reasonable to believe is telling the truth" is sufficient to establish probable cause. *Gerald M., 858 F.2d at 381* (internal quotation marks and citation omitted). We consequently rejected the plaintiff's argument that the victim was not credible because of the ill will between his family and those of his aggressors, as well as their claim that a more complete investigation was required. See id. While it is true that Spiegel, unlike **[*24]** the plaintiffs in Gerald M., points to actual inconsistencies in the victims' report, the dispositive principle applied there--that a putative victim's report in most cases establishes probable cause--is fully applicable here.

Next, we turn to Spiegel's cross-appeal, which challenges the dismissal under Fed. R. Civ. P. 12(b)(6) of the claims against Zielke and Hennelly and of the conspiracy claim. The district court properly dismissed these claims. Spiegel's amended complaint alleges that Zielke "urged" Cortese and others to charge and arrest Spiegel. But Spiegel did not allege that Zielke had authority to arrest him, and the allegation that she simply urged the police to arrest Spiegel, without more, does not give rise to liability under § 1983. See, e.g., *Jenkins, 147 F.3d at 583* (only those who participate in or cause a constitutional deprivation are subject to § 1983 liability).

As to Hennelly, he is entitled to qualified immunity for relying on Cortese's determination of probable cause in arresting Spiegel. The conclusion that Hennelly's actions were proper is bolstered by our recent holding in *Jenkins, 147 F.3d at 585,* wherein we stated as follows: **[*25]**

"when an officer has 'received his information from some person--normally the putative victim or an eyewitness--who it seems reasonable to believe is telling the truth,' he has probable cause" to arrest the accused perpetrator. *Gramenos*

v. Jewel Cos., 797 F.2d 432, 439 (7th Cir. 1986) (quoting *Daniels v. United States, 129 U.S. App. D.C. 250, 393 F.2d 359, 361 (D.C. Cir. 1968))* (other citations omitted). Thus, when a supermarket security guard witnesses an individual shoplifting, and the police arrest the individual based on the guard's report, qualified immunity shields the arresting officers from § 1983 liability. *See Gramenos, 797 F.2d at 439.* . . . So long as a reasonably credible witness . . . informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest, and their actions will be cloaked with qualified immunity [even] if the arrestee is later found innocent. *See [Tangwall, 135 F.3d at 520].*

In the case sub **[*26]** judice, Hennelly relied on information from a fellow police officer, supported by his own independent investigation, that there was probable cause to believe that Spiegel had committed battery. If law enforcement officials enjoy qualified immunity whenever they reasonably rely upon information provided by ordinary citizens, or public servants such as emergency medical personnel, *see Sheik-Abdi v. McClellan, 37 F.3d 1240, 1247 (7th Cir. 1994),* or security guards, *see Tangwall, 135 F.3d at 520,* it would be odd to now hold that an officer relying on reasonable information from a fellow officer is somehow entitled to less protection from civil liability.

Finally, we uphold the dismissal of Spiegel's conspiracy claim because his bare allegations are insufficient to demonstrate an agreement among the defendants to deprive him of a constitutional right. *See Kunik v. Racine County, 946 F.2d 1574, 1580 (7th Cir. 1991)* (conspiracy claim cannot survive dismissal if allegations "are vague, conclusionary and include no overt acts reasonably **[*27]** related to the promotion of the alleged conspiracy").

The district court's judgment against Cortese is REVERSED. As to the cross-appeal, the judgment

dismissing the claims against Hennelly and Zielke, and the conspiracy claim, the district court's judgments are

AFFIRMED.

----------Footnotes----------

n1 It may be possible to misinterpret a passage in *Kelley v. Myler, 149 F.3d 641, 646 (7th Cir. 1998),* to support the proposition that officers must establish probable cause as to each and every element of a crime before they are authorized to make an arrest. This is not the law. Although *Kelley, 149 F.3d at 646,* says that once "an officer has established probable cause on every element of a crime, he need not continue investigating in order to test the suspect's claim of innocence[,]" this passage should not be read to mean that only if each and every element has been established may an officer make an arrest. To the contrary, caselaw is very clear that:

we begin with a recognition that probable cause is a relatively fluid concept. It exists "if 'at the moment that arrest was made . . . the facts and circumstances within [the arresting officer's] knowledge and of which [he] has reasonably trustworthy information were sufficient to warrant a prudent man in believing that'" the arrestee was committing, or had committed, a crime. *Hunter, 502 U.S. at 228, 112 S. Ct. at 537* (quoting *Beck, 379 U.S. at 91, 95 S. Ct. at 225).* As an objective test, probable cause is "less than a rule of more-likely-than-not, but how much less depends on the circumstances," *Gramenos, 797 F.2d at 438,* including "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879 (1949).*

Tangwell, 135 F.3d at 518-19 (brackets, quotations, and citations in original); *see also Eversole, 59 F.3d at 718.*

----------End Footnotes----------

[*21]

LEXSEE 920 F. Supp. 891

MARSHALL SPIEGEL, Plaintiff, v. CITY OF CHICAGO; Det. JOSEPH CORTESE # 20868; Det. WILLIAM BRANNIGAN # 24, Sgt. DENNIS MURPHY # 2167; Sgt. FRANK KAJARI # 2116; and HOLLY ZIELKE, Department of Aging of the City of Chicago, Defendants.

No. 95 C 3697

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

920 F. Supp. 891; 1996 U.S. Dist. LEXIS 3565

March 22, 1996, Decided

March 25, 1996, DOCKETED

COUNSEL:

[1]** For MARSHALL SPIEGEL, plaintiff: G. Flint Taylor, Jr., [COR LD NTC A], People's Law Offices, Chicago, IL.

For CITY OF CHICAGO, defendant: Irene Schild Caminer, [COR], Sharon Baldwin, [COR], Margaret Ann Carey, [COR], Patricia Jo Kendall, [COR LD NTC A], City of Chicago, Law Department Corporation Counsel, Chicago, IL. Susan S. Sher, [COR], City of Chicago, Law Department, Chicago, IL. For JOSEPH DET. # 20868, Det. # 20868,

JAMES HENNELLY, Sgt. # 20818, DENNIS MURPHY, Sgt. # 2167, WILLIAM BRANNIGAN, Capt. # 24, defendants: James Patrick McCarthy, [COR], Alec McAusland, [COR LD NTC A], City of Chicago, Law Department Corporation Counsel, Chicago, IL. For HOLLY ZIELKE, Department of Aging of the City of Chicago, defendant: Gregory J. Wojkowski, [COR], Yvonne Spradley La Grone, [COR LD NTC A], City of Chicago, Law Department Corporation Counsel, Chicago, IL.

JUDGES:
Ruben Castillo, United States District Judge

OPINIONBY:
Ruben Castillo

OPINION:

[*894] MEMORANDUM OPINION AND ORDER

Plaintiff Marshall Spiegel filed suit under *42 U.S.C. § 1983* against the City of Chicago, five Chicago Police Officers and an employee of the Department of Aging of the City of Chicago alleging **[**2]** that they unlawfully charged, arrested and confined him in violation of his Fourth and Fourteenth Amendment rights. The defendants' motions to dismiss are presently before the Court.

RELEVANT FACTS n1

On May 29, 1993, Spiegel, along with his wife and son, were in their apartment when they were disturbed by noise emanating from the apartment above. First Amended Complaint, ("Amend. Comp."), P 8. When Spiegel's wife went upstairs to ask their neighbors, Loren Cherny and Mim Bobbin, to stop 'making the noise, an argument ensued. *Id.*, PP 9-10. Spiegel heard the argument, went upstairs and

joined in the confrontation which escalated to the point where Cherny and Bobbin both shoved Spiegel. *Id.*, PP 11-12. Spiegel contends that he never made any offensive contact with either Cherny or Bobbin. **[**3]** *Id.*, P 13.

Two days after the incident, on May 31, 1993, Spiegel filed a battery report with the police against Cherny and Bobbin. Id., P 14. On June 23, 1993, plaintiff obtained summons and complaints against Bobbin and Cherny and Cherny was served with a summons and notified of his court date n2. *Id.* Two days after receiving the summons, Cherny went to the police station, accused Spiegel of battery and demanded Spiegel's arrest. *Id.*, P 16.

Based upon Cherny's charges, defendant Detective Cortese, called Spiegel's home and informed his wife that he had been charged with battery and that Spiegel must either turn himself in or he would be arrested. *Id.*, P 19. Upon learning of the pending charge, Spiegel called Cortese apparently in an effort to straighten the matter out. *Id.*, P 20. Cortese informed the plaintiff that the battery charge was based on the allegations of Cherny and Bobbin that plaintiff kicked **[**4]** Cherny in the leg during their confrontation **[*895]** on May 29, 1993. *Id.* Plaintiff denied kicking Cherny and explained to Cortese that he filed a battery complaint against Cherny several weeks earlier, that he was the one who was shoved during the altercation and that Cherny's allegations were simply retaliatory. *Id.*, P 21.

Spiegel further informed Cortese that the incident arose from a long-standing dispute between the neighbors about noise and that his wife, as well as other independent witnesses, would corroborate his story. *Id.* Spiegel also requested at this time that he be served with a summons and complaint as Cherny was rather than being arrested. *Id.* After talking with Cortese, Spiegel spoke with defendant Sergeant Kajari and apprised him of the same information. *Id.*, P 22. No further investigation was conducted after his telephone

conversations with Cortese and Kajari. *Id.*, P 23. Spiegel turned himself in later that day and was processed at the police station and placed in a cell for about an hour before being bonded out. *Id.*, PP 24-25.

LEGAL STANDARDS

A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *Triad* **[**5]** *Assoc. Inc. v. Chicago Housing Authority, 892 F.2d 583, 586 (7th Cir. 1989), cert. denied, 498 U.S. 845, 112 L. Ed. 2d 97, 111 S. Ct. 129 (1990).* When considering a motion to dismiss, the Court views all facts alleged in the complaint--as well as any inferences reasonably drawn therefrom--in the light most favorable to the plaintiff. *Mosley v. Klincar, 947 F.2d 1338, 1339 (7th Cir. 1992).* A motion to dismiss will be denied unless it appears beyond doubt that the plaintiff can prove no facts which would entitle him or her to relief. *Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).*

ANALYSIS

Wrongful Arrest Claim

Spiegel seeks compensatory and punitive damages for injuries he alleges he suffered based on his wrongful arrest at the hands of five Chicago Police Officers and an employee of Chicago's Department of Aging. According to Spiegel, the police lacked probable cause to arrest him because they failed to conduct a sufficient investigation into the facts supporting his arrest.

Qualified Immunity

The defendants' motions to dismiss require this Court to resolve the issues of qualified immunity which exist in this case. Courts have been admonished to resolve qualified immunity **[**6]** issues at the earliest possible stage of litigation. *Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct.*

534, 536, 116 L. Ed. 2d 589 (1981). Qualified immunity protects government officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).* To apply this standard, we determine whether the right allegedly violated was clearly established when the challenged conduct occurred, and then evaluate the legal reasonableness of the defendants' conduct. *Biddle v. Martin, 992 F.2d 673, 675 (7th Cir. 1993).*

When a warrantless arrest is the subject of a § 1983 action, the defendant officer is "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest" the plaintiff. *Hunter v. Bryant, 502 U.S. 224, 228, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991); Anderson v. Creighton, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).* Probable cause exists when the police have facts and circumstances within their knowledge based upon reasonably trustworthy information that those facts and circumstances are sufficient **[**7]** to allow a prudent person to believe that the suspect has committed or was committing an offense. *Sheik-Abdi v. McClellan, 37 F.3d 1240, 1246 (7th Cir. 1994), cert. denied, U.S. , 130 L. Ed. 2d 882, 115 S. Ct. 937 (1995).* Probable cause is a nontechnical concept which seeks to accommodate the interests of effective law enforcement, on the one hand, versus the privacy and liberty interests possessed by citizens who follow the law. The police, in determining whether probable cause exists, must assess **[*896]** probabilities in specific factual scenarios, and such assessment is not conducive to precise legal rules. *Illinois v. Gates, 462 U.S. 213, 232, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983).* "In recognition of the endless scenarios confronting police officers in their daily regimen, courts evaluate probable cause 'not on the facts as an omniscient observer would perceive them, but on the facts as they would have appeared to a reasonable person in the position of the

arresting officer-seeing what he saw, hearing what he heard.'" *Sheik-Abdi, 37 F.3d at 1246,* citing, *Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992),* citing, *Richardson v. Bonds, 860 F.2d 1427, 1431 (7th Cir. 1988).*

The probable cause **[**8]** objective standard does not imply that "an officer risks his career and his fortune by believing an apparently sober eyewitness to a crime." *Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 439 (7th Cir. 1986), cert. denied, 481 U.S. 1028, 95 L. Ed. 2d 525, 107 S. Ct. 1952 (1987).* "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter, 502 U.S. at 227,* citing *Anderson, 483 U.S. at 641.* The test of qualified immunity for police officers is whether a reasonable officer could have believed that probable cause existed to arrest the plaintiff in light of clearly established law and the information the arresting officers possessed. *Anderson, 483 U.S. at 641.* Therefore, applying these principles to the instant case, we must examine each defendant officer's conduct in light of his specific knowledge of the facts from the perspective of a reasonable officer.

Claims Against Defendant Officers Hennelly, Brannigan and Murphy

The standard for qualified immunity protection with respect to defendants Hennelly, Brannigan and Murphy has been met and we find that they are protected. Although it is unclear from the pleadings, **[**9]** the Court infers that these officers are included in this suit as either the arresting officers or processing personnel. Officers carrying out arrest orders are entitled to rely on that order being based upon sufficient probable cause. *Gordon v. Degelmann, 29 F.3d 295, 300 (7th Cir. 1994);* see also *Bibart v. Stachowiak, 888 F. Supp. 864, 867 (N.D. Ill. 1995).* Fear of personal liability if the arrest warrant later turns out to be invalid would "interfere with

valuable institutions of law enforcement." *Gordon, 29 F.3d at 300. Gordon* suggested that granting immunity to the arresting officer would simply place the liability solely upon the person who issued the erroneous instructions which would protect all those involved. *Id.*

The reasoning advanced in *Gordon* makes good sense. Arresting officers, like the defendants here, who reasonably rely upon information obtained from another law enforcement official regarding an arrest warrant are entitled to qualified immunity should that information later be proved incorrect. *Bibart, 888 F. Supp. at 867.* Accordingly, we grant defendants Hennelly, Brannigan and Murphy's motions to dismiss Count I. *Claims Against Defendant* **[**10]** *Officers Cortese and Kajari*

Normally, "when an officer has 'received his information from some person--normally the putative victim or an eye witness--who it seems reasonable to believe is telling the truth,' he has probable cause." *Grimm v. Churchill, 932 F.2d 674, 675 (7th Cir. 1991).* Therefore, to defeat the defense of qualified immunity on his wrongful arrest claims against Cortese and Kajari, Spiegel's complaint must demonstrate that the information known to Cortese and Kajari did not constitute reasonably trustworthy information sufficient to lead a prudent officer to conclude that plaintiff committed a battery upon Cherny.

Cortese and Kajari are the officers in this case who appear to have had sufficient exposure to the facts to make a probable cause determination. However, Spiegel's complaint specifies that defendants Cortese and Kajari were also aware of information which undermined Cherney's credibility. Spiegel specifically alleges that he informed Cortese and Kajari that he had an ongoing feud with Cherny and of the prior complaint filed by Spiegel regarding the same incident. Spiegel **[*897]** alleges that he told Cortese and Kajari that independent witnesses would corroborate **[**11]** his

contention that Cherny was bringing a false and retributive claim. Spiegel contends that based upon Cherny's alleged grudge against him, Cortese and Kajari should have found Cherny's reliability suspect and, therefore, had a duty to further investigate Spiegel's contentions before arresting him.

A Police Officer's Duty To Conduct Further Investigation

Because probable cause is fact-specific, it follows that the degree of investigation necessary to determine probable cause is completely dependent upon the circumstances of each case. Although defendants are correct in asserting that there is no "constitutional or statutory requirement that before an arrest can be made the police must conduct a trial," *Gramenos, 797 F.2d at 439,* citing *Morrison v. United States, 491 F.2d 344, 346 (8th Cir. 1974),* a police officer's duty to investigate until a reasonable belief can be formed that a crime has been committed is clearly established. Because the "reasonableness" standard of the fourth amendment links the constitutional obligation to prudent conduct, when information an officer receives warrants further investigation a prudent officer must do more to determine probable **[**12]** cause. *Hebron v. Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994).*

The duty to investigate and look behind an officer's reliance on the veracity of a victim or witness has been clearly established in this circuit since at least 1994. In *Hebron* tenants complained to police that their landlords had cut off their water and refused to allow them to use their washer-dryer in the basement. After learning that the tenants were being evicted and may have bore a grudge against their landlords, the court noted that police properly recognized the questionability of the complaint and needed to investigate further. *Id at 423.* The officers visited the apartment building and confirmed that the tenants had no hot water. They discovered that the landlord had working water, that the landlord's claim that the tenants received the same water she

did was false and that the landlord admitted denying access to the washer and dryer. *Id.* The court found that after an initially questionable complaint a reasonable investigation was conducted which accumulated enough evidence to support an arrest. *Id.*

Similarly, in an earlier case cited by *Hebron,* this circuit admonished officers for not conducting **[**13]** a sufficient investigation when a restaurant owner complained to police that patrons had left without paying their bill. *Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1345 (7th Cir. 1985).* Based solely upon the owner's claim, the police arrested the plaintiffs after asking only one question--whether they were present at the restaurant that evening. *Id.* The court rebuked the officers' lack of common sense in conducting no further investigation into the dispute over the bill when information was readily available and stated that, if explanations had been sought, the dispute may have been solved in a reasonable manner n3. *Id.* at 345-46.

Other circuits have also established that factual circumstances may require a police officer to conduct more than a superficial investigation before determining **[**14]** probable cause. *Sevigny v. Dicksey, 846 F.2d 953, 957-58 (4th Cir. 1988)* (no probable cause when the officer unreasonably failed to interview witnesses at the scene of an accident who would have corroborated plaintiff's story); *Merriman v. Walton, 856 F.2d 1333, 1335 (9th Cir. 1988), cert. denied, 491 U.S. 905, 105 L. Ed. 2d 696, 109 S. Ct. 3188 (1989)* (further inquiry required for probable cause when a kidnapping suspect was arrested after the police knew the victim was safely at home, the suspect was the victim's long time boyfriend and voluntarily called and cooperated with the police upon learning of the charge); *Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1432 (10th Cir. 1984) vacated on other grounds sub nom., City of Lawton, Okla. v. Lusby,*

474 U.S. 805, 88 L. Ed. 2d 33, 106 S. Ct. 40 (1985), aff'd after reconsideration, **[*898]** *796 F.2d 1307* (10th Cir.) *cert. denied, 479 U.S. 884, 93 L. Ed. 2d 251, 107 S. Ct. 275 (1986)* (no probable cause when officer refused to interview cashier at scene of shoplifting who would have confirmed plaintiff paid for the merchandise).

Defendants rely on *Gerald M. v. Conneely, 858 F.2d 378 (7th Cir. 1988)* and *Gramenos, 797 F.2d 432,* to support their position that a victim or witness's testimony alone is sufficient **[**15]** to establish probable cause and, therefore, negate an officer's duty to conduct further investigation. They are both distinguishable. In *Gerald M.*, a ten year old victim's complaint that his bicycle had been stolen by another ten year old boy and his brother was sufficient to establish probable cause to detain the two boys. *Gerald M., 858 F.2d at 381.* Like the instant case, there was a history of animosity between the families which, the court noted, may have created a question of the victim's reliability had the police been aware of this animosity at the time of the arrest. *Id.* But unlike our case, the police in *Gerald M.* were unaware of the families' squabbles at the time and no other evidence was shown to have given the police any reason not to believe the victim's statements. *Id.*

In *Gramenos,* a store security guard was the sole eyewitness to plaintiff's shoplifting charge and his statement alone was used to establish probable cause. *Gramenos, 797 F.2d at 439.* Although the court noted that a single witness's complaint is sufficient to establish probable cause, the security guard was distinguished as "not just any eyewitness." *Id.* The distinction **[**16]** was based upon the reasonable reliability that a security guard as a professional in an institutional setting would not bring a claim based on a grudge or without careful consideration. *Id.* In other words, the police had no reason to question the veracity of the guard's information.

In our case, however, Spiegel presented Kajari and Cortese with information before his arrest that should have questioned the officers belief in Cherny's reliability and prompted a further investigation. Spiegel informed Kajari and Cortese that he had a long-standing dispute with Cherny, that he previously filed a complaint against Cherny and that a delay of almost a month had occurred before Cherny filed a battery complaint against Spiegel. The officers should then have reasonably been aware that Cherny may have had a grudge against Spiegel. Moreover, Spiegel informed the officers that independent witnesses would confirm that Cherny, and not Spiegel, committed the battery. The timing of Cherny's charge, the allegation of retribution and the availability of independent witnesses would have created doubt in a reasonable officer to warrant a further investigation.

We recognize that police officers have **[**17]** a difficult job and it is not their duty to conduct extensive trial-type investigations before conducting an arrest. Nevertheless, with the information Kajari and Cortese possessed, they had a reason to doubt Cherny's reliability and had readily at there disposal independent witnesses who could have clarified whether a crime had been committed at all. Additionally, this case did not deal with any exigent or emergency circumstances. *See e.g., Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985)* (the amount of information necessary for probable cause is a function of the gravity of the crime and the danger of repetition). The situation here demonstrates no emergency was at hand and, in fact, the police had plenty of time to investigate Cherney's stale complaint and chose not to. As a result, after drawing all inferences in favor of the plaintiff from the well pleaded facts, we find Spiegel has stated a potential cause of action against defendants Kajari and Cortese for wrongful arrest and has overcome their defense of a qualified immunity at this stage of the proceeding. n4 Defendants' motions to dismiss Count I are

accordingly denied with respect to defendants Kajari and Cortese.

False Arrest Claim Against Zeilke

Spiegel contends that Zeilke, an employee of the City of Chicago's Department of Aging, conducted an incomplete and biased investigation. As a result Spiegel **[*899]** charges Zielke with falsely arresting him in violation of his Fourth and Fourteenth Amendment rights. However, Zeilke, in her civilian capacity, has no special power or authority to arrest or charge anyone. 65 ILCS 5/3.1-15-25 (1993); Municipal Code of Chicago, § 2-16-010 (1992). Moreover, Spiegel has not alleged any facts against Zeilke that place Zeilke in a different position than defendants Hennelly, Brannigan and Murphy. Therefore the Court finds that defendant Zeilke is also protected by qualified immunity. Spiegel's Complaint' does not sufficiently state a cause of action against Zeilke and fails to allege facts necessary for a recovery. *Conley v. Gibson, 355 U.S. 41, 45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* As a result, defendants' motion to dismiss Count I against Zeilke is granted.

Wrongful Detention Claim

Spiegel challenges the reasonableness of his arrest even if probable cause existed. Spiegel claims that because he was arrested rather than served with a summons and a complaint, **[**19]** and because the police detained him in a cell for an hour subsequent to the arrest, the five police officers and Zeilke violated his Fourth and Fourteenth Amendment rights to be free from unreasonable seizure.

Illinois law allows full custodial arrest for misdemeanors such as the plaintiff was charged. 725 ILCS 5/107-2(1)(c)(1994). The only constitutional perimeters effecting the legislatures decision to allow custodial arrest for different crimes is that the arrest must be based upon probable cause. *United States v. Robinson, 414 U.S. 218, 235, 38 L. Ed. 2d*

427, 94 S. Ct. 467 (1973). Therefore, Spiegel did not have a constitutional right to be served a summons and complaint rather than be arrested. n5

Because the lawfulness of Spiegel's detention must focus again upon probable cause, we return to the discussion above in which defendants Hennelly, Brannigan and Murphy were found to be protected by qualified immunity. The officers were entitled to rely on the arrest orders which they were carrying out as being based upon sufficient probable cause. *Gordon v. Degelmann, 29 F.3d 295, 300 (7th Cir. 1994).* Nothing in the complaint alleges that these officers had any specific knowledge of the facts of the case or that these officers could not reasonably rely upon the arrest orders obtained from their other law enforcement officials. Also as stated above, defendant Zielke had no authority or power to arrest, detain or make a probable cause determination in her capacity as a civilian. The complaint does not sufficiently allege facts upon which Spiegel may recover against Zielke. Accordingly, we grant defendants Hennelly, Brannigan, Murphy and Zielke's motions to dismiss count II of the complaint.

Similarly, because we have found that Spiegel has adequately pled his claim for wrongful arrest against Cortese and Kajari, their motion to dismiss Count II is also denied.

Conspiracy **[**21]** *Claim*

Spiegel contends that the five officers and Zielke conspired together to deprive him of his constitutional rights to be free from unreasonable seizures. In order to state a claim for conspiracy under § 1983, the complaint must establish conspiracy in some detail and provide some factual basis supporting the existence of a conspiracy. *Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206-07 (7th Cir. 1980).* Conclusory statements suggesting a conspiracy are not

enough to state a claim. *Id.* "A complaint inadequately alleges conspiracy when the facts it alleges are vague, conclusionary and include no overt acts reasonably related to the promotion of the alleged conspiracy." *Kunik v. Racine County, 946 F.2d 1574, 1580 (7th Cir. 1991).*

[*900] In the instant case, even when the allegations are construed favorably for the plaintiff, as they must be, Spiegel has failed to identify any acts on the part of the defendants which would possibly link them to a conspiracy. Spiegel contends that the overt acts supporting his claim include his arrest, processing and being held in custody while processed, as well as the officers' failure to thoroughly investigate the charge against **[**22]** him. However, these acts provide no details which could reasonably demonstrate a meeting of the minds between any of the individual defendants. No specific conversations or correspondence between any of the officers or Zielke are alleged in which to conclude the defendants conspired together to deprive Spiegel of his constitutional rights.

Rather, the acts relied on by Spiegel merely demonstrate the defendants conducting themselves during the normal course of processing a criminal complaint, irrespective of Cortese and Kajari's poor judgment during their investigation. Therefore, defendants' motions to dismiss the conspiracy claim in Count III is granted for all individual defendants.

Policy Claim Against The City Of Chicago

Count IV of the Amended Complaint alleges that the City of Chicago's Police Department's policies failed to provide for special investigations to be conducted in misdemeanor cases when cross charges are filed and when decisions are made whether or not to proceed by summons or arrest. As a result, Spiegel claims the individual defendants were encouraged to violate his constitutional rights.

There are a number of ways to allege that a governmental **[**23]** policy is involved in an unconstitutional act under § 1983. In the absence of direct evidence such as a written policy, the existence of a governmental policy or custom is usually shown by demonstrating a series of bad acts and inviting the court to infer from them that the policymakers were bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned the actions. *Jackson v. Marion County, 66 F.3d 151, 152 (7th Cir. 1995).* In other words, a demonstration of enduring practices of officials or their subordinates may create liability under the statute. *Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1326 (7th Cir. 1993).* Spiegel has not alleged a series of enduring practices or bad acts, however, but focuses on the single event of his alleged improper arrest and detainment.

An unconstitutional policy can also be inferred when the complaint charges the municipality with having engaged in improper conduct directly, such as a claim that the municipality itself failed to properly train its officers to avoid inflicting unconstitutional injuries. *City of Canton v. Harris, 489 U.S. 378, 387, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989).* Liability would **[**24]** attach in that case where police, while exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to policymakers who were deliberately indifferent to the need. *Id. at 390.*

This deliberate indifference seems to be what Spiegel is aiming for in his complaint. However, Spiegel does not demonstrate more than the one incident complained of where his alleged faulty policy or training created a constitutional violation. As a result, the allegations in the complaint simply do not satisfy the "official policy" requirements. The City of Chicago's motion to dismiss Count IV is granted. *Spiegel's 9-102 Claim*

Spiegel contends that because the City of Chicago is the employer of the individual defendants and the individual defendants allegedly committed the constitutional violations within the scope of their employment, should they be found liable on any count, pursuant to § 9-102 of the Illinois Tort Immunity Act n6, the City would be liable for any judgment entered against its employees.

The City contends that allowing a pre-judgment 9-102 claim would circumvent **[*901]** the restriction of claims based upon *respondeat superior* set forth by *Monell v. Dept. of Social Servs., 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* According to the City, because the issue under 9-102 is the employer-employee relationship, this claim does not arise from a common nucleus of operative facts under which supplemental jurisdiction would apply. However, as noted in *Ellis v. Bankhead, 828 F. Supp. 45, 47 (N.D. Ill. 1993),* the supplemental jurisdiction statute, *28 U.S.C. § 1367,* has broadened the scope of federal jurisdiction to include those claims that are so related to claims in the action already within the court's original jurisdiction that they form part of the same case or controversy. The issue of the City's liability is closely related within the scope of § 1367 to the claims against the individual defendants in this case. Therefore, Spiegel's claim survives the jurisdictional analysis.

The City also contends that this count should be dismissed because a 9-102 action is only applicable after a judgment has been entered against one of its employees. Some confusion has ensued as to whether it **[**26]** is proper to allow a pre-judgment claim under 9-102.

Spiegel asserts that under *Ellis, 828 F. Supp. at 47,* and *Argento v. Village of Melrose Park, 838 F.2d 1483, 1489 (7th Cir. 1988),* which rely on *Estate of Ahmed v. County of Cook, 146 Ill. App. 3d 719, 497 N.E.2d 345, 100 Ill. Dec. 368 (1st*

Dist. 1986), a 9-102 claim is properly brought pre-judgment. Spiegel's reliance on this authority is misplaced.

In *Ahmed*, the court did not address the pre-judgment issue because the case centered around a post-judgment controversy over the interest rate applicable to the award of damages. *Estate of Anmed, 146 Ill. App. 3d at 720, 497 N.E.2d at 346. Argento*, relying on *Ahmed*, merely finds that it is proper for a 9-102 claim to be "brought in the same action as the one against the government employee in his individual capacity." *Argento, 838 F.2d at 1489.* The issue of the propriety of a pre-judgment 9-102 claim was not addressed in *Argento* either, because plaintiff's claim in that case was also post-judgment. Spiegel next relies heavily upon *Ellis*, which muddies the waters by seemingly misquoting *Argento* and allowing pre-judgment 9-102 claims. *Ellis, 828 F. Supp. at 47.* **[**27]** Nowhere in *Argento* have we found the portion cited relating to the admissibility of pre-judgment claims.

After closely examining *Ellis* and *Argento*, we believe the correct statement of the law was set forth by Chief Judge Aspen in *Rosentreter v. Munding, 736 F. Supp. 165, 171-72 (N.D. Ill. 1990)*, which held that 9-102 claims were strictly relegated to the post-judgment stages of the litigation. We therefore hold that a 9-102 claim cannot be brought prior to a judgment against a City employee. Accordingly, the City's motion to dismiss Count V is granted.

CONCLUSION

For the foregoing reasons, the Court grants defendants Hennelly, Brannigan, Murphy and Zielke's motions to dismiss Counts I, II, and III. Defendants Cortese and Kajari's motions to dismiss are denied as to Counts I and II; and granted as to Count III. The defendant City of Chicago's motions to dismiss Counts IV and V are granted.

The Court will hold a status hearing on April 25, 1996 at 9:00 a.m. to set an appropriate schedule to address the issues that remain in this case.

ENTER:

Ruben Castillo

United States District Judge

March 22, 1996

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The facts recited here are taken from the plaintiff's allegations in the pleadings, which the Court must take as true for purposes of this motion. *Mosley v. Klincar, 947 F.2d 1338, 1339 (7th Cir. 1992).*

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - - n2 The Amended Complaint is unclear as to whether Bobbin was either served or arrested.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

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n3 The issue of probable cause in Moore went to the jury due to questionable warrantless entry and events resulting therefrom, but the court's imposition of the duty to conduct further investigation was clear.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - - n4 Of course, this determination may change once the parties have completed discovery in this matter and have properly developed the facts surrounding Spiegel's arrest.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -
- **[**18]**

n5 Spiegel offers the City of Chicago Police Department Special Order 79-32 attached to his response as evidence that the officers were required to serve him with a summons rather than effectuate full arrest. Matters outside the pleadings are not to be considered for the purposes of a 12(b)(6) motion to dismiss. However, even if considered, the order does not mandate that Spiegel be served a complaint rather than be arrested; it merely qualifies that service was an option for police to consider.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -
- - - - **[**20]**n6 Section 9-102 of the Act provides in part: A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages for which it or an employee while acting within the scope of employment is liable in the manner provided in this Article.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -
- **[**25]**

LEXSEE 966 F. Supp. 684

**MARSHALL SPIEGEL, Plaintiff,
v. Det. JOSEPH CORTESE and
Sgt. FRANK KAJARI,
Defendants.**

No. 95 C 3697

**UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS,
EASTERN DIVISION**

***966 F. Supp. 684; 1997 U.S.
Dist. LEXIS 8001***

June 3, 1997, Decided

June 5, 1997

DISPOSITION:

[1]** Defendants' motion for summary judgment denied.

COUNSEL:

For MARSHALL SPIEGEL, plaintiff: David Carl Thomas, Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, IL. G. Flint Taylor, Jr., People's Law Offices, Chicago, IL.

For CITY OF CHICAGO, defendant: Sharon Baldwin, Margaret Ann Carey, Patricia Jo Kendall, City of Chicago, Law Department, Corporation Counsel, Chicago, IL. Susan S. Sher, City of Chicago, Law Department, Chicago, IL. Irene Schild Caminer, City of Chicago Department of Law, Chicago, IL.

For JOSEPH CORTESE, Det. #20868, JAMES HENNELLY, Sgt. #20818, DENNIS MURPHY, Sgt. #2167, WILLIAM BRANNIGAN, Capt. #24, defendants: James Patrick McCarthy, Alec McAusland, City of Chicago, Law Department, Corporation Counsel, Chicago, IL.

For HOLLY ZIELKE, Department of Aging of the City of Chicago, defendant: Gregory J. Wojkowski, Yvonne Spradley La Grone, City of Chicago, Law Department, Corporation Counsel, Chicago, IL.

JUDGES:
Ruben Castillo, United States District Judge

OPINIONBY:
Ruben Castillo

OPINION:

[*686] MEMORANDUM OPINION AND ORDER

Plaintiff Marshall Spiegel originally brought this action against the City of Chicago, five Chicago police officers and an employee of the city's Department of Aging, alleging that he was unlawfully arrested and confined in violation of the Fourth and Fourteenth Amendments. Ruling on the defendants' motion to dismiss, this Court eliminated all but one count and two defendants. Remaining is Spiegel's claim that defendants Detective Joseph Cortese and Sergeant Frank Kajari violated his constitutional rights under *42 U.S.C. § 1983* by arresting **[*687]** him without probable cause. Cortese and Kajari's motion for summary judgment on this issue is presently before the Court.

RELEVANT FACTS n1

We start by presenting the facts, drawing all reasonable inferences in favor of Spiegel, the non-moving party. *See*

Wolf v. Buss America, Inc., 77 F.3d 914, 918 (7th Cir. 1996). It is an unfortunate reality that the genesis of this litigation is a noise dispute between Spiegel and his wife, Carol, and their neighbors, Loren Cherny and Min Bobin. Cherny and Bobin lived directly above the Spiegels in the Hollywood Towers Condominium complex. (Defs.' Facts P 1). On May 29, 1993, the Spiegels were disturbed by noise coming from Cherny and Bobin's residence and went upstairs to complain. (Pl.'s Add'l Facts P 1). Carol began pounding on Cherny and Bobin's door; Spiegel stood nearby, holding his young son. (Cherny Dep. at 38-39; Spiegel Dep. at 12, 17). Cherny and Bobin came out of their condo and into the hallway, inadvertently locking the door behind them. (Cherny Dep. at 43). A heated argument ensued, prompted, each couple claims, by the others' barrage of insults. (Spiegel Dep. at 6-7, 19, 32; Cherny Dep. at 41-42). Hanan Hughes, another Hollywood Towers resident, peered into the hallway from her doorway -- she confirms the argumentative exchange. (Hughes Dep. at 7-8).

At some point, **[**3]** it appears that the altercation became physical. Spiegel testifies that Cherny rushed toward him and pushed him with both hands. (Spiegel Dep. at 26, 33). Cherny, however, claims that Spiegel, still holding his son, backed Cherny into the corner outside of his locked door and kneed him in the inner thigh. (Cherny Dep. at 42-43). According to Hughes, who was still watching from her doorway, Cherny did shove Spiegel, but the shove was in response to Spiegel's advance toward him. (Hughes Dep. at 8). She denies seeing Spiegel kick Cherny, but did hear Cherny exclaim that Spiegel had kicked him and Spiegel immediately deny having done so. (*Id.* at 23-24). At last, Eugene Simms, the doorman at Hollywood, arrived at the behest of Hughs' husband and persuaded the Spiegels to return home. (*Id.* at 6, 8, 38). This incident was the culmination of several noise-related disputes between the couples.

Two days later, on May 31, Spiegel went to the Chicago Police Department and filed a police report. (Defs.' Facts P 2). Spiegel alleged in the report that he had been shoved by both Cherny and Bobin, and listed his wife as a witness. (*Id.* P 2; Pl.'s Add'l Facts PP 44-45). He did not file **[**4]** a complaint against Cherny or Bobin at that time. n2 (Defs.' Facts P 6). On June 21, 1993, Spiegel **[*688]** returned to the police station to file criminal charges. (*Id.* P 7). He spoke with Defendant Sergeant Kajari about the May 29th incident, telling Kajari that two neighbors had battered him while he was holding his child. (*Id.*) Spiegel asked Kajari whether Cherny and Bobin had filed a report against him. (*Id.* P 9). After checking the computer for the information, Kajari told Spiegel that they had not, and explained that, if Spiegel wished to file charges, he would need to return another day because the warrant desk was closed. (*Id.* PP 8, 10). Spiegel came back on June 23 and swore out a summons and complaint against Cherny and Bobin. (*Id.* P 11). The warrant clerk declined to issue the summons; instead, he referred the matter for further investigation. (Pl.'s Add'l Facts P 37).

Cherny and Bobin also went to the police station on June 23, 1993 to file a police report concerning the May 29th incident. (*Id.* P 12). On June 25, 1993, Kajari assigned defendant Detective Cortese to investigate Cherny and Bobin's report. (Cortese Dep. at 44 & Defs.' Ex. E). Kajari thereafter maintained overall responsibility for supervising the investigation, but does not remember discussing the investigation with Cortese after assigning it to him. (Pl.'s Add'l Facts; Kajari Dep. at 18).

Cortese interviewed Cherny and Bobin on June 25th. (Pl.'s Add'l Facts P 39). During the interview, Cherny and Bobin described the May 29th incident from their perspective. n3 They told Cortese the following: at approximately 6:20 p.m. on May 29, 1993, while Cherny and Bobin were having dinner, they heard loud pounding on their door. (Cherny Dep. at 38-39). When they opened the door,

they discovered Spiegel and Carol in the hallway. (*Id.* at 39). Carol began screaming that she had been disturbed by the continuous noise emanating from Cherny and Bobin's unit. (*Id.* at 39-40). Meanwhile, Spiegel, holding his child, moved within eight inches of Cherny's face and backed Cherny into the corner **[**6]** outside of his door. (*Id.* at 42). Spiegel repeatedly said, "Come on you old fart, hit me; hit me!" (*Id.*) Spiegel then raised his knee and struck Cherny in the inner thigh. (Cherny Dep. at 43; Hennelly Dep. at 45-46). Bobin, after having been insulted by Carol, tried to get back into her condo. (Cherny Dep. at 42-43). Because the door was locked, Bobin could not get in. (*Id.* at 43). Bobin states she may have informed Cortese that, at this point, Spiegel pushed her and she reacted by pushing him back. (Bobin Dep. at 22, 23, 98). Doorman Simms then arrived, prompting Spiegel and Carol to return to their condo. (Cherny Dep. at 44). Cherny told Cortese that another witness, whom Cortese later found out was Hanan Hughes, had been present for part of the incident. (Cortese Dep. at 111).

In addition to interviewing Cherny and Bobin for one hour on the 25th, *see* Pl.'s Add'l Facts P 86, Cortese reviewed a number of documents. From these he learned that the May 29, 1993 incident was not an isolated event, but rather was the culmination of a series of disputes between the Spiegels and Cherny and Bobin. Cortese read Spiegel's May 31, 1993 police report, which alleged that he and Cherny and Bobin had an "ongoing verbal dispute," and that during the May 29th argument, Cherny and Bobin both shoved him -- as witnessed by Spiegel's wife. (Pl.'s Add'l Facts P 44). The report also related that Cherny and Bobin had previously threatened to harm Spiegel physically. (*Id.* P 45). Corroborating the parties' acrimonious relationship were documents provided by Cherny: Cherny's June 23, 1993 battery case report, two letters from Spiegel to the Hollywood Towers Condominium Association (the "HTCA"), a letter

from the HTCA to Cherny and Bobin, and one or two resident incident reports filled out by Bobin. n4

[*689] The HTCA letters arose from informal action that the Association took, beginning in February 1993, to address the Spiegel-Cherny-Bobin noise disputes. Cherny told Cortese that the Spiegels had started things by complaining to the HTCA that Cherny and Bobin were making an unreasonable amount of noise. (Cherny Dep. at 28, 30). The HTCA set a hearing on this matter and gave notice to the Spiegels. (Defs.' Ex. L). In one of the letters Cherny gave to Cortese, dated February 3, 1993, Spiegel informed the HTCA that he needed more time to obtain counsel. (Defs.' Facts P 35; Defs.' Ex. L). The second letter, dated February 11, 1993, relayed the HTCA's decision resolving the hearing in Cherny and Bobin's favor. (Defs.' Facts P 34; Defs.' Ex. K). The third letter, dated June 2, 1993, was signed by Spiegel and addressed to the HTC property manager, challenging the notice that HTCA had provided Spiegel for its upcoming disciplinary hearing against him. (Defs.' Facts P 39; Defs.' Ex. M).

Cherny and Bobin also furnished Cortese with copies of either one or two residence incident reports filed with the HTCA describing the May 29th altercation. One report bears two dates--June 1, 1993 and June 17, **[**9]** 1993. (Defs.' Facts P 15). The full document contains a two-page summary of May 29th's events, alleging on page two that Spiegel "kicked" Cherny. But Cortese testified that his file contains only the first page -- which does not refer to any physical contact between Spiegel and Cherny. (*Id.*; Cortese Dep. at 78, Ex. 4; Pl.'s Facts P 15). Before completing the report dated both June 1, 1993 and June 17, 1993, Bobin had filled out another two-page resident incident report dated only June 1, 1993. (Defs.' Facts P 16; Defs.' Ex. P). While this report also describes the May 29 incident, it does not mention that Spiegel kicked or kneed Cherny. (Defs.' Ex. P). Although the parties suggest that Cortese may have seen this document, it

remains unclear whether it was actually presented to him. (Defs.' Facts P 16; Pl.'s Facts P 16). Cherny says that he "possibly" had shown it to Cortese. (Cherny Dep. at 141). Cortese, however, denies having been given this document. (Cortese Dep. at 68).

Nonetheless, Cherny claims he supplied Cortese with evidence of Spiegel's battery during the June 25th interview by showing him a photograph of his bruised right thigh, which he claims was taken on or about **[**10]** June 1, 1993. (Defs.' Facts PP 19-20). As further proof, Cherny testified that he lowered his pants and showed Cortese and Detective Hennelly, Cortese's partner, the remnants of a bruise that Cherny attributed to Spiegel. (*Id.* P 32). Cortese could not tell how old the bruise was, but Hennelly thought it was between two-and-a-half and four weeks old. (Cortese Dep. at 106; Hennelly Dep. at 63). Hennelly also testified that the bruise in the 6/1/93 picture appeared to be basically the same age as the actual bruise Cherny showed him on June 25th. (Pl.'s Add'l Facts P 77).

On the same day he interviewed Cherny and Bobin, Cortese called Spiegel's home to speak with him about the couple's allegations. (Defs.' Facts P 41; Cortese Dep. at 126). Spiegel's wife answered the telephone. (Pl.'s Add'l Facts P 86). Although Spiegel had listed her as a witness on his May 31 police report, Cortese did not question Carol about the incident. (*Id.*) Cortese simply told Carol that an allegation of wrongdoing was pending against Spiegel and that Spiegel would be arrested at his home if he did not call the police station. (*Id.* PP 86, 88)

When Spiegel returned Cortese's phone call, Cortese told **[**11]** Spiegel about the charges against him and instructed him to come to the police station with bond money. (Defs.' Facts P 42; Pl.'s Add'l Facts P 93). Spiegel responded that he had filed similar charges against Cherny and Bobin two days earlier. He explained that Cherny and Bobin were the ones

actually guilty of battery, and that there were witnesses who would corroborate Spiegel's story. He mentioned the police report he filed against Cherny and Bobin in May and offered to fax Cortese all pertinent documents. Finally, he told Cortese that Cherny and Bobin's charges were fabricated, **[*690]** filed in retaliation for the summons and complaint that Spiegel had sworn out against Cherny and Bobin two days before. (Defs.' Facts P 43; Pls.' Add'l Facts PP 94, 96-98). Instead of following up on Spiegel's statements, Cortese read him his rights and told him to get a lawyer. (Pl.'s Add'l Facts P 93; Spiegel Dep. at 121-22). Spiegel says that he then asked to speak to Kajari, to whom he repeated this information. (Defs.' Facts P 99; Spiegel Dep. at 239). Kajari, however, refused to interfere in Cortese's investigation. *Id.* In his deposition, Kajari denies having spoken with Spiegel. (Kajari Dep. at **[**12]** 50).

Later that same day, Spiegel's attorney called Cortese and informed him that Spiegel would not be providing any more information about the incident. (Pl.'s Add'l Facts P 110; Cortese Dep. at 137, 139). Cortese immediately halted his investigation. (Cortese Dep. at 137, 139). He had not spoken to Hanan Hughes or Carol Spiegel about what they had seen on May 29th, despite having been given their names as potential witnesses. He did not request the names or phone numbers of any other witnesses who might corroborate Spiegel's story. Nor did Cortese talk to anyone from the Hollywood Towers Condominium Association or request documentation beyond what he reviewed during Cherny and Bobin's interview. Following his lawyer's phone call to Cortese, Spiegel went with his lawyer to the police station, where he was arrested for battery. n5 (Pl.'s Add'l Facts P 115). He was subsequently tried and acquitted of all charges. (*Id.* P 118).

Spiegel brought suit against the City of Chicago, five police officers, and an employee of the Department of Aging, alleging that the police officers failed to adequately

investigate Cherny and Bobin's allegations before arresting him. The defendants moved for dismissal. This Court granted that motion in part, dismissing from the suit all defendants except Cortese and Kajari. With respect to Cortese and Kajari, the Court held that Spiegel's allegations stated a claim for wrongful arrest under *42 U.S.C. § 1983. Spiegel v. City of Chicago, 920 F. Supp. 891, 898 (N.D. Ill. 1996).* The facts as alleged demonstrated that the officers were aware of information that undermined the reliability of Cherny's allegations that Spiegel battered him on May 29th. *Id.* We found that "the timing of Cherny's charge, [Spiegel's] allegation of retribution and the availability of independent witnesses would have created doubt in a reasonable officer to warrant a further investigation." *Id.* Therefore, the complaint, taken at face value, revealed the absence of constitutionally required probable cause for Spiegel's arrest. *Id.* We also went on to reject, at the dismissal stage, the officers' **[**14]** defense that qualified immunity insulated them from suit. *Id.*

Cortese and Kajari now move for summary judgment on Spiegel's remaining claim for wrongful arrest. Cortese maintains that the record shows his investigation was sufficient to uncover probable cause for Spiegel's arrest, while Kajari argues that he is not liable because he did not participate in the arrest. Both officers urge that, should the Court deny summary judgment on probable cause, the defense of qualified immunity still protects them from suit because they reasonably believed that they had probable cause to arrest Spiegel. After considering the parties' arguments, we deny the defendants' motion for summary judgment.

LEGAL STANDARDS

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue for trial exists when

the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* The court must view all evidence in a light most favorable **[**15]** to the nonmoving party, *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir. 1987),* and draw all inferences in the nonmovant's favor. *Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990).* However, if the evidence is merely colorable, **[*691]** or is not significantly probative, summary judgment may be granted. *Anderson, 477 U.S. at 249-50; Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1032 (7th Cir. 1988).* In determining whether a genuine issue exists, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson, 477 U.S. at 254.* The court's sole function is to ascertain whether sufficient evidence exists to support a verdict in the nonmovant's favor. Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Id. at 255.*

ANALYSIS

The first argument defendants propound in support of summary judgment is that Spiegel's arrest was lawful because it was supported by probable cause. Reduced to its essentials, defendants' claim is that Cortese acted upon reliable information from Cherny **[**16]** and Bobin and took account of all the evidence readily available to him. Under these circumstances, they argue, Cortese cannot be held liable for wrongful arrest under § 1983.

I. Detective Cortese -- Probable Cause

The Fourth Amendment, enforced against state officials through § 1983, prohibits police officers from arresting a suspect without probable cause. n6 *United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989).* In evaluating whether a

police officer had probable cause to arrest a suspect, the court considers the facts and circumstances of which the officer was aware of at the time of the arrest. *Jones v. Watson, 106 F.3d 774, 779 (7th Cir. 1997).* The probable cause assessment varies with the need for prompt action and the quality of available information. *Maxwell v. Indianapolis, 998 F.2d 431, 434 (7th Cir. 1987)* (citations omitted). With respect to the latter, the key question is whether the information relied upon was reasonably trustworthy "'to warrant a prudent man in believing' that the arrestee" had committed a crime. *Sheik-Abdi v. McClellan, 37 F.3d 1240, 1246 (7th Cir. 1994)* (citations omitted). A police officer is by no means expected **[**17]** to conduct a trial-type inquiry before making this determination; in fact, a statement by the victim of the crime will usually suffice. *Gramenos v. Jewel Co., 797 F.2d 432, 439 (7th Cir. 1986).* However, if something about the victim or his report would lead a reasonable officer to question the victim's reliability, then the officer must proceed with a more thorough investigation before making an arrest. *Hebron v. Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994).*

In a § 1983 damages suit such as the one before us, the question of whether a police officer had probable cause to make an arrest is typically **[**18]** a jury question:

If the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts of the reasonable inferences to be drawn from them. Accordingly, a conclusion that probable cause existed as a matter of law is appropriate only when no reasonable jury could find that the officers did not have probable cause to arrest [the defendant].

Maxwell, 998 F.2d at 434.

Based on these standards, Spiegel claims that Cortese lacked probable cause to arrest him because his investigation was woefully inadequate. Knowing about the history of disputes between the Spiegels and Cherny and Bobin, as well as the police report Spiegel filed against the couple nearly a month before they decided to press charges against Spiegel, a reasonable officer would allegedly have suspected that Cherny and Bobin bore a grudge against Spiegel and questioned whether the information they supplied was trustworthy. Moreover, Spiegel claims, the inconsistency between Cherny and Bobin's story and the documents they gave Cortese, **[*692]** as well as the appearance of Cherny's bruise -- which seemed not to have aged at **[**19]** all since it was photographed three weeks earlier -- would likewise have raised doubts about the complainants' credibility. Rather than jumping the gun to arrest Spiegel the same day based on the word of such unreliable complainants, a reasonable officer would have performed a more thorough investigation -- which would include questioning the potential witnesses whose names he possessed. At the very least, Spiegel argues, these facts present a jury question as to probable cause.

In response, Cortese insists that he had probable cause to arrest Spiegel. First, he claims that the information, documents, and photographs obtained from Cherny and Bobin, together with evidence of Spiegel's guilty conscience, support a finding of probable cause. n7 Second, he maintains that the evidence of any grudge that Cherny and Bobin bore against Spiegel was insufficient to call the reliability of their information into question. Third, he argues that he had no duty to search out witnesses from Hollywood Towers because they were not immediately available to him. Finally, Cortese claims that the evidence considered in hindsight does not exculpate Spiegel; therefore, it does not "vitiate" Cortese's original **[**20]** finding of probable cause.

A. Evidence Undermining Cherny and Bobin's Reliability

We begin by addressing the parties' arguments about the significance of a possible grudge on Cherny's and Bobin's part. **[**21]** In *Gramenos v. Jewel Co.*, the Seventh Circuit acknowledged that the existence of a grudge on the part of the complainant may necessitate a more thorough investigation to establish probable cause. *797 F.2d 432, 439 (7th Cir. 1986)*. Recently, the court reaffirmed *Gramenos*, and confirmed that if the alleged victim bears a grudge against the suspect, a reasonable police officer should be suspicious of that person's complaint and investigate further. *Hebron v. Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994)*. Two tenants had called the police complaining that their landlord had turned off their water and refused them access to their washer-dryer. *Id. at 422*. Because they knew that the tenants were in the process of being evicted, the officers suspected that the tenants harbored a grudge against the landlord. *Id. at 423*. Consequently, they went to the apartment to check out the tenants' story. *Id.* When they arrived, the officers discovered that the tenants' water had indeed been turned off and that the landlord, who lived below, had running water. *Id.* Furthermore, the landlord admitted to the officers that she had denied the tenants access to their property. *Id.* **[**22]** The court held that the officers' investigation was adequate to establish probable cause because the officers had taken steps to verify the tenants' allegations which, in light of their impending eviction, were "of questionable reliability." *Id.* Given the "significant chance that [the tenants] bore a grudge against their landlords," it would have been "unreasonable -- and therefore unconstitutional -- to arrest the landlords on the tenants' mere say-so." *Id.*

In this case, Cortese denies that Cherny and Bobin harbored such animosity towards Spiegel -- according to Cortese, Spiegel is the only person with a grudge. It was he who repeatedly lodged noise complaints against Cherny and

Bobin and placed antagonistic notes in their mailbox. Cortese suggests that because Cherny and Bobin never filed any harassment-based complaints against Spiegel until after the May 29th incident, there is no evidence of ill will on their part. Consequently, he distinguishes *Hebron*, which involved a "two way fight"; here, **[*693]** by contrast, the harassment allegedly went in only one direction. Defs.' Br. at 9. In addition, Cortese asserts that the HTCA's finding in favor of Cherny and Bobin on Spiegel's **[**23]** noise complaints constitutes objective evidence boosting Cherny and Bobin's reliability. Finally, Cortese claims that Cherny and Bobin could not have held a grudge against Spiegel based on his June 23, 1995 complaint because there is no evidence that they were aware of it. Even if they were, Cortese argues that cross-complaints do not indicate a grudge. n8

Viewing the facts in a light most favorable to Spiegel, they present a triable issue as to whether Cherny and Bobin were grudge-bearing complainants. First, Spiegel's alleged harassment and noise complaints alone could have fostered a grudge. Far from leaving Cherny and Bobin unbiased, Spiegel's behavior gave them a reason to retaliate against him. Spiegel initiated noise complaints against Cherny and Bobin beginning in early 1993, forcing Cherny and Bobin to appear and defend themselves before the HTCA. n9 On several other occasions, **[**24]** Cherny and Bobin opened their mailbox only to find acrimonious correspondence from Spiegel accusing them of making too much noise. On May 29, 1993, Cherny and Bobin were once again bothered by their irate neighbors. Only this time, Spiegel and Carol had disrupted Cherny and Bobin's Sunday afternoon dinner by pounding on the door and shouting insults. According to Cherny and Bobin, Spiegel's accusations were completely false -- the couple insists that they never made an unreasonable amount of noise. Cortese was privy to all this information, having received it during Cherny and Bobin's June 25th interview. From this evidence alone, a jury could

infer that Cortese had reason to suspect the trustworthiness of the information provided by Cherny and Bobin, given the distinct possibility that they were upset at their neighbors for continually harassing them about nonexistent noises. n10

The grudge evidence at Cortese's fingertips was not limited, however, to Cherny and Bobin's perceived harassment over noise. Because Cherny and Bobin waited almost a month to file a police report, they very well could have discovered that Spiegel had filed a report against them on May 31st and returned to file charges on both June 21st and 23rd. Although there is no evidence indicating that Cherny and Bobin were actually aware of the actions Spiegel had taken against them, Cortese knew about the sequence of events, both from reading Spiegel's May 31 police report and his phone **[**26]** conversation with Spiegel on June 25th. A reasonable officer in his position should have been alerted to the possibility of retaliation, and questioned Cherny and Bobin about prior knowledge of Spiegel's police report and charges. This is especially true given Cortese's knowledge that the parties' dispute was ongoing and escalating. That it later came to light that Cherny and Bobin had not been formally served with a summons and complaint when they met with Cortese does not mean that they were unaware of Spiegel's actions against them. Nor does it change what Cortese knew then -- that Spiegel filed a police report and charges first, and that Cherny and Bobin's charges came directly on the heels of Spiegel's.

[*694] The facts before us are easily distinguished from *Gramenos v. Jewel Co., 797 F.2d 432 (7th Cir. 1986)*, where the court found probable cause to arrest based on the testimony of one eyewitness. In *Gramenos*, the police arrested a suspect for shoplifting based solely on the word of the store's security guard. *Id. at 434*. Although the a single eyewitness' statement provided the impetus for arrest, the court emphasized that there was no reason to doubt the

security guard's [**27] credibility; indeed, he had every reason to be truthful:

> [A] guard is not just any eyewitness. The chance that the complainant is pursuing a grudge, a risk in believing an unknown witness, is small in an institutional setting. The guard who pursues a private agenda may be fired and disgraced; there are automatic penalties that the police are entitled to consider. The store will insist that guards err on the side of caution. It does not want to embarrass and anger an honest customer -- not only because this is bad for business but also because a false charge of crime may lead to costly tort litigation under state law.

Id. at 439. The guard in *Gramenos*, unlike Cherny and Bobin, had no longstanding dispute with the plaintiff. By filing a complaint against Gramenos, he was simply discharging his duty to keep the store safe from theft. Cherny and Bobin, in contrast, had none of the incentives the guard had to be vigilant about the accuracy of their story. Instead, they had motivation to embellish or fabricate facts in order to rid themselves of their vociferous neighbor once and for all. Confronted with the possibility of Spiegel's continued harassment, Cherny [**28] and Bobin are much more akin to the tenants in *Hebron*, who faced eviction if they did not take preemptive steps against their landlords.

Nevertheless, Cortese maintains that any credibility questions the grudge raised were overcome by Cherny and Bobin's candor and the objective evidence they provided him. First, Cherny showed Cortese a bruise on his inner thigh, which appeared to Detective Hennelly to be a few weeks old, consistent with Cherny's claim that Spiegel had "kneed" him in the inner thigh on May 29th. This evidence was allegedly corroborated by the photograph of the bruise, taken, Cherny said, on June 1st. Second, according to Cortese, Cherny and Bobin were believable because their narrative was "internally

consistent." Third, Cherny's reliability was allegedly supported by documentary evidence that the HTCA found Spiegel's noise complaints unjustified.

The flaw in Cortese's argument is that this "objective" evidence is either dependent on Cherny and Bobin's trustworthiness, which he had reason to question, or it is irrelevant. To begin with, we reject the illogical proposition that Cherny and Bobin's report of the May 29th incident was rendered reliable by the HTCA's **[**29]** earlier and unrelated findings on Spiegel's noise complaints. Cortese cannot use evidence that Cherny and Bobin prevailed on one occasion to prove that they were telling the truth on another. With respect to Cherny's bruise, Cortese had to rely on Cherny's word that Spiegel was its source and that it had been photographed on June 1st. It appeared to Detective Hennelly, however, that the bruise he saw on June 25th was basically the same age as the bruise in the picture. Likewise, the fact that Cherny and Bobin's story was internally consistent did not permit Cortese to ignore other evidence that undermined it. For example, the June 1, 1993 residence incident report that Cherny admits Cortese "may have" seen makes no mention of physical contact. Even if he did not receive this document, the record reflects that Cortese possessed only the first page of the second incident report dated June 1 and June 17, 1993, which also omits allegations of battery -- only page two alleges that Spiegel "kicked" Cherny in the right thigh. Viewing these facts in a light favorable to Spiegel, a reasonable jury could find that Cortese had only Cherny's word that Spiegel kicked him -- a word tainted by the **[**30]** likelihood that Cherny bore a grudge against Spiegel. n11

[*695] B. Cortese's Failure to Conduct an Adequate Investigation

Given that a reasonable jury could conclude that Cherny and Bobin were not reasonably trustworthy sources of

information, the next question is whether Cortese nevertheless conducted an investigation that sufficiently compensated for the complainants' possible bias. To establish probable cause, an investigation must be thorough enough to uncover reasonably trustworthy information that would lead a reasonable person to believe that the accused has committed a crime. **[**31]** *Jones, 106 F.3d at 779.* When the officer has reason to question the trustworthiness of the complaining witness because, for example, he appears to harbor ill will against the accused, the officer has a duty to conduct an investigation in an effort to uncover independent evidence that the suspect committed the offense alleged. *Hebron, 18 F.3d at 423.* "Sometimes information from or about a person claiming to be the victim of a crime would lead a reasonable officer to be suspicious, making further investigation prudent -- and, because the 'reasonableness' standard of the fourth amendment links the constitutional obligation to the standard of prudent conduct, the officer must do more." *Id.; see also Moore v. The Market Place Restaurant, Inc., 754 F.2d 1336, 1346 (7th Cir. 1985)* ("If we wish to have our citizen population continue to respect the authority of police . . . it is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention."). The Seventh Circuit has elaborated on an officer's constitutional duty to perform a reasonable investigation:

A police officer **[**32]** may not close her or his eyes to the facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had even taken place.

Be Vier v. Hucal, 806 F.2d 123, 127-28 (7th Cir. 1986).

In *Moore v. The Marketplace Restaurant, Inc., 754 F.2d 1336, 1347 (7th Cir. 1985),* the court held that a jury could find that the defendant police officers failed to conduct a reasonable investigation in their rush to arrest plaintiffs based solely on the claim by a restaurant manager and a waitress that plaintiffs had refused to pay for their meal. Upon receiving the manager and waitress' complaint, the officers proceeded directly to the plaintiffs' camper, and asked whether they had been at the restaurant in question. When plaintiffs answered affirmatively, the officers arrested them without further inquiry. *Id. at 1340.* The court held that, viewed in a light most favorable to the plaintiffs, the investigation was constitutionally wanting. *Id. at 1346.* Armed with just one side of the story, the police hurried to arrest the plaintiffs, who showed no signs of fleeing -- they were **[**33]** sleeping in their camper at the time -- for a minor offense. *Id. at 1345.* The officers never asked the plaintiffs for their side of the story, but made the arrest based on the mere fact that plaintiffs admitted their presence at the restaurant that evening. *Id.* Had the officers "used reasonable judgment and conducted a proper investigation, inquiring both as to the plaintiffs' presence in the restaurant and the dispute over the bill," the plaintiffs' rights would have been preserved. After hearing both versions of the incident, the police could then have undertaken further investigation in order to resolve the dispute reasonably. *Id. at 1345-46.*

By contrast, the officers in *Hebron v. Touhy, 18 F.3d 421,* were found to have conducted a reasonable investigation because they went beyond the tenant-complainant's allegations, which might well have been tainted by spite. Not content with soon-to-be-evicted the tenants' word that the landlord had deprived them of running water and access to their property, the officers went straight to the scene of the alleged crime and asked the suspect for her version of the facts. *Id. at 423.* In other words, by making the effort to **[**34]** double-check the complainant's story instead of

rushing blindly to arrest the suspect before she could offer an explanation, the officers obtained an independent source of evidence that supported the tenants' accusations. This ensured that their probable **[*696]** cause determination was premised on reasonably trustworthy information.

Cortese's "investigation" resembles the officers' shoddy investigation in *Moore*, not the reasonable inquiry in *Hebron*. First, like the police in *Moore*, Cortese rushed to make an arrest without obtaining an explanation from the suspect. Relying exclusively on two witnesses whose neutrality was open to question, Cortese called Spiegel immediately after interviewing the complainants and instructed him to come to the police station with bond money. He never asked Spiegel for his side of the story; in fact, he blatantly ignored Spiegel's statements that Cherny and Bobin were the ones who had committed battery, that he had witnesses to prove it, and that Cherny and Bobin's charges were false and retributive claims filed in retaliation for the police report, summons and complaint that Spiegel had filed against them first. Second, in contrast to the police **[**35]** in *Hebron*, Cortese made no efforts to corroborate Cherny and Bobin's allegations with independent evidence. n12 He never investigated the scene of the crime or interviewed the witnesses residing in Hollywood Towers whose names were provided to him. Although Cortese had read Spiegel's police report listing his wife as a witness to the May 29th incident, Cortese asked Carol nothing about the altercation when he talked to her on the phone. Instead of taking this opportunity to get potentially valuable information, Cortese simply told Carol that Spiegel was to call the police station on pain of arrest. In addition, he knew that at least one other Hollywood Towers resident, Hanan Hughs, had witnessed the event, but made no effort to contact her. And he never attempted to contact anyone from the HTCA or to request from the Association any documentation it may have had relating to the May 29th incident. Third, like the suspect in *Moore*, Spiegel's alleged

offense was minor -- misdemeanor battery -- and he demonstrated no risk of flight. Instead of avoiding the police, Spiegel promptly returned Cortese's phone call and went to the police station as requested. Yet Cortese moved to arrest **[**36]** Spiegel with remarkable speed and little information -- the same day as Cherny and Bobin's interview. Under these circumstances, a reasonable jury could find Cortese's investigation inadequate because it was not based on the independent evidence necessary to produce reasonably trustworthy information.

Cortese responds with several arguments. First, he insists that he did not have a duty to investigate further because once probable cause is found, an officer need not interview other witnesses who would allegedly corroborate a suspect's claims of innocence. While this is undoubtedly true, it begs the question of whether **[**37]** probable cause was present in the first place. Probable cause exists when there is reasonably trustworthy information to warrant a prudent person in concluding that a crime had been committed. *Jones v. Watson, 106 F.3d 774, 779 (7th Cir. 1997)*. As we have already held, a reasonable officer would have questioned Cherny and Bobin's trustworthiness based on the possibility that they bore a grudge against Spiegel for repeatedly harassing them about noise.

Second, Cortese claims that the law requires only that he interview witnesses who were "readily available" to him. Because no witnesses other than Cherny and Bobin were within Cortese's "immediate grasp," he contends, he had no duty to seek them out. In support of this theory, Cortese cites several cases. *See Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988); Moore, 754 F.2d 1336;* and *Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984)*. Cortese, however, misperceives the holdings in these cases. These decisions hold that, under certain circumstances, a police officer is required to conduct more than a superficial investigation before determining probable cause. More importantly, none

of these decisions has [**38] held that an officer's constitutional duty to make a probable cause determination is *restricted* to questioning only those witnesses [*697] who are immediately available. *See Sevigny, 846 F.2d at 957-58; Moore, 754 F.2d at 1345-46; Lusby, 749 F.2d at 1432.* In other words, interviewing immediately available witnesses is a necessary, but not sufficient, condition to a reasonable investigation. Furthermore, permitting police officers to stop an investigation after questioning only witnesses within their immediate grasp would produce absurd results. Investigating officers are not always at the scene of the crime and able to question witnesses. It does not follow that these witnesses are unavailable to the officers for questioning. In this case, there is no reason why Cortese could not have asked Spiegel or his attorney for the names and phone numbers of the witnesses whom Spiegel told Cortese would substantiate his story. Cortese could then have followed up simply by picking up his telephone. n13

Simply put, we find that a reasonable jury could conclude that Cortese knowingly abused his arrest powers under the circumstances of this case. Our holding that a reasonable jury could find Cortese's investigation lacking is further bolstered by the fact that it was not commensurate with the gravity of Spiegel's alleged crime and the danger of its imminent repetition. *See Llaguno v. Mingey, 763 F.2d 1560, 1566 (7th Cir. 1985)* (extent of required investigation is greater where offense is not serious and is unlikely to be repeated). In *Llaguno*, the police had a limited amount of information to support probable cause, but because the suspect was accused of murder, the court found his initial arrest acceptable, holding that "if a multiple murderer is at large, the police must compress their investigation and make their decision to search or arrest on less information than if they could investigate at their own leisure." n14 *Id. at 1566-67.* Given the fact that a shooting had occurred and the police were

fearful of its imminent repetition, the court found the scope of the investigation reasonable. *Id.*

The present situation is far removed from *Llaguno*, which involved a serious felony and the danger that the suspect would kill again. *Id.* Here, Spiegel was accused of committing a misdemeanor battery that produced a lone bruise. Moreover, Cortese had no reason to believe that Spiegel would repeat his alleged actions. There was no evidence of previous physical altercations between Cherny and Spiegel, nor that Spiegel was a violent person. In the month between the alleged battery and Cherny's visit to the police station, there were no reports of altercations between the Spiegels and Cherny and Bobin, and Cortese does not state that he was fearful that the May 29th incident would be repeated. Instead, Cortese says that he cut off his investigation because Spiegel's lawyer informed him that Spiegel would not provide any further information. While Cortese was not able to further question Spiegel, Cortese remained free to carry out his investigation by questioning other witnesses. An officer is not permitted to retaliate against a suspect for invoking his Fifth Amendment rights by refusing to conduct a proper investigation.

[*698] Viewing all disputed facts in Spiegel's favor, as we must, **[**41]** we find that a reasonable jury could conclude that Cherny and Bobin were grudge-bearing complainants and that Cortese should have conducted a more thorough investigation by searching for independent evidence. In short, we find a genuine issue of material fact as to whether Cortese had probable cause to arrest Spiegel.

II. Sergeant Kajari's Involvement

"Section 1983 creates a cause of action based upon personal liability and predicated upon fault." *Wolf-Lillie v.*

Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Consequently, for a supervisory official to be liable under § 1983, that official must have had direct responsibility for the improper action. *Id.* There must be a "causal connection, or an affirmative link, between the misconduct complained of and the. official sued." *Id.* Personal liability for the constitutional violation exists, for example, if the official "know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye." *Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988).* Mere negligence is insufficient. *Id.* In short, the plaintiff must demonstrate that the official knowingly, willfully, **[**42]** or recklessly "caused the alleged deprivation by his action or failure to act." *Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986).*

Kajari contends that he is not liable under § 1983 because he did not participate in the decision to arrest Spiegel. While he admits that he assigned Cortese to investigate Cherny and Bobin's report, and maintained overall responsibility for supervising that investigation, he denies having discussed the investigation with Cortese or having spoken with Spiegel about the case.

What Kajari conveniently ignores is that Spiegel testified that he talked to Kajari on the phone right after Cortese told him to come down to the station. During his conversation with Kajari, Spiegel claims he explained that: 1) he had filed a police report against Cherny and Bobin right after the May 29th incident, nearly a month before Cherny and Bobin's interview; 2) Cherny and Bobin were the ones guilty of battery, and he had witnesses to prove it; and 3) Cherny and Bobin's charges against him were retaliatory, filed in response to Spiegel's police report and the complaint and summons he had sworn out a day earlier. Spiegel states that Kajari responded that he would not **[**43]** interfere with Cortese's investigation. Viewed in Spiegel's favor, these facts support a finding that Kajari, as Cortese's direct supervisor, participated in the arrest by approving Cortese's decision with

full knowledge of facts that would have led a reasonable officer to investigate further. Kajari's contrary testimony that he never spoke to Spiegel creates a swearing contest that the jury must resolve.

In addition, Spiegel maintains that Kajari knew all these facts as early as June 21, when Spiegel first talked to Kajari about filing charges against Cherny and Bobin. Told not once, but twice, about circumstances that called the reliability of the complaining witnesses into question and warranted further investigation, Kajari turned a blind eye to the actions of the officer he was supposed to supervise by failing to intervene. Under these circumstances, a jury could reasonably conclude that Kajari acted with reckless indifference by failing to prevent Spiegel's arrest. *See Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986)* (§ 1983 liability may be premised on a knowing, wilful or reckless failure to act).

III. Qualified Immunity

The availability of qualified **[**44]** immunity is generally a legal question for the court to decide "at the earliest possible stage in litigation." *Forman v. Richmond Police Dept., 104 F.3d 950, 957 (7th Cir. 1997)* (citations and internal quotations omitted). If the issue of qualified immunity turns on disputed facts, however, the jury must resolve them at trial. *Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987)* (qualified immunity not appropriate for summary judgment when there are genuine issues of material fact); *Irvin v. Kaczmaryn, 913 F. Supp. 1190, 1200 (N.D. Ill. 1996)* ("Where the facts giving rise to qualified immunity are disputed, summary judgment is not proper.") (citations and internal quotations omitted). An arresting officer **[*699]** is immune from the vagaries of trial "'if a reasonable officer could have believed [the plaintiff's arrest] to be lawful, in light of clearly established law and the information the

officer possessed.'" *Hunter v. Bryant, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991).* The Seventh Circuit has adopted a two-step analysis to guide courts in resolving this issue: "1) Does the alleged conduct set out a constitutional violation? and 2) Were the constitutional **[**45]** standards clearly established at the time in question?" *Forman, 104 F.3d at 957.*

Courts often address the second prong first in order to avoid having to pass on the constitutionality of an officer's particular actions -- for if a right is not clearly established, a reasonable officer could not be said to have known about it. *See id. at 958.* The plaintiff has the burden of proving that the right allegedly violated is clearly established. *Id. at 957-58.* To meet this burden, the plaintiff need not point to a case finding the same exact action to be unlawful or a case that is "on all fours" with the present set of facts and circumstances. *Id. at 958.* A "clearly analogous" case decided before the officer's action or inaction in the present case is sufficient to confirm that a right is clearly established. *Id.* Examined in light of the analogous case, the unlawfulness of the officer's actions must have been "apparent" at the time he took them. *Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).*

Only if the law is clearly established must the court move on to ask whether the officer's actions were constitutional. The plaintiff must **[**46]** show that "reasonable officers confronting the specific facts and relevant law in [the case before the court] would have known that their conduct violated [the plaintiff's] constitutional rights." *Maxwell v. City of Indianapolis, 998 F.2d 431, 435 (7th Cir. 1993).* The Supreme Court has emphasized that "even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter, 502 U.S. at 227* (citations and internal quotations omitted).

In light of these standards, we must ask the following questions. First, at the time Spiegel was arrested in 1993, was it clearly established that an arresting officer had a duty to look beyond a victim's complaint if he had reason to believe that the victim was not trustworthy? Second, could any reasonable police officer nonetheless have mistakenly believed that there was probable cause to arrest Spiegel based solely on Cherny's and Bobin's claims?

To answer the first question, it was clearly established as of June 1993 that probable cause, or at least a reasonable belief that there is probable cause, is required to avoid liability for false arrest under § 1983. *Be Vier v.* **[**47]** *Hucal, 806 F.2d 123, 126 (7th Cir. 1986).* Although this standard is not sufficiently particularized to alert a reasonable officer as to the constitutionality of a particular action, *see Anderson, 483 U.S. at 639,* there is clear binding authority that condemns the investigatory methods the officers used here. In *Moore v. The Marketplace Restaurant, Inc.*, the court established a police officer's duty to conduct a thorough investigation and "exercise reasonable judgment before invoking the awesome power of arrest and detention." *754 F.2d at 1345-46.* Earlier in this opinion, we found the actions taken by the police in *Moore* clearly analogous to the officers' conduct here. Moreover, both the Supreme Court and the Seventh Circuit have held since at least 1985 that for an arrest to be constitutional, the information relied upon in finding probable cause must be reasonably trustworthy. n15 *Hunter, 502 U.S. at 228; Moore, 754 F.2d at 1345.* While the Seventh Circuit did not definitively state that a grudge would render a particular complainant untrustworthy until *Hebron* in 1994, the fact that a grudge situation was not before the Seventh Circuit until *Hebron* does **[**48]** not exonerate Cortese or Kajari. Whatever term the courts decide to use, common sense **[*700]** dictates that a reasonable police officer should question the trustworthiness of complainant who harbors ill feelings toward the suspect, and investigate

further in search of more reliable evidence. The Seventh Circuit has encouraged the use of common sense in conducting criminal investigations:

If we may be so bold as to paraphrase Justice Holmes' thought, "there is no law against using common sense"; indeed, the use of common sense is a prerequisite for police officers in developing their investigation in order to effectuate a valid arrest.

Moore, 754 F.2d at 1346. Thus, we find that, as of Spiegel's arrest in 1993, it was clearly established that the police must base probable cause determinations on reasonably trustworthy information and, if necessary, conduct a thorough investigation to find it. These are the very standards that Cortese is alleged to have violated in this case -- making the unlawfulness of his conduct "apparent."

Despite this clearly established law, Cortese and Kajari would still be entitled to qualified immunity if a reasonable police officer could have mistakenly believed that there was probable cause to arrest Spiegel. This puts us in the perilous position of determining whether a reasonable officer could have reasonably, albeit mistakenly, believed that the information he received from Cherny and Bobin was reasonably trustworthy -- and we cannot see how the extra layer of reasonableness adds anything to the probable cause analysis undertaken in the first part of the opinion. The Seventh Circuit has recognized that the question of probable cause in unlawful arrest cases is virtually indistinguishable from the qualified immunity issue:

The rub here lies in the substantial, if not complete, overlap of the issue of immunity and the principal issue on the merits. The three officers attempt to draw a distinction by contending

that the relevant inquiry is into "arguable probable cause," which is another way of asking whether they had probable cause to think they had probable cause. This assumes, however, that probable cause, itself measured on a shifting scale, is independent of what **[**50]** an arresting officer could reasonably have known. If that were true, the belief of the three police officers that [the information they possessed] created probable cause would be grounds for granting immunity, irrespective of the actual existence of probable cause. But the conduct of the police officers would then depend on their subjective good faith, rather than an objective standard. We require the latter.

Maxwell, 998 F.2d at 435-36; see also Moore, 754 F.2d at 1357 (Posner, J., concurring) (qualified immunity depends on whether police had probable cause to arrest).

We find that Cortese and Kajari's actions in arresting Spiegel on the word of Cherny and Bobin without further investigation could be found objectively unreasonable, defeating their qualified immunity defense on summary judgment. *See Maxwell, 998 F.2d at 436* (officers not entitled to qualified immunity defense where their conduct may be found objectively unreasonable). Viewing the facts most favorably to Spiegel, we find that neither officer could have reasonably but mistakenly concluded that there was probable cause for arresting Spiegel. A reasonable police officer in Cortese's shoes would have **[**51]** been suspicious of Cherny and Bobin's month-old claim and the possibility that they bore a grudge against Spiegel and conducted a more thorough investigation to uncover independent evidence. Similarly, a reasonable officer in Kajari's position -- fully informed of all the facts -- would have intervened to prevent Spiegel's arrest. In *Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987)*, the court held that if there are questions of fact upon which the issue of qualified immunity depends, summary judgment should be denied. Such material facts

exist here, and we cannot say as a matter of law on the undisputed facts that the defendants' actions were objectively reasonable. The Court therefore rejects summary judgment on Cortese's and Kajari's qualified immunity defense.

CONCLUSION

The defendants' motion for summary judgment is hereby denied. We reject Cortese and Kajari's qualified immunity defense, but, if appropriate, will permit them to raise at trial a damages immunity defense. This case **[*701]** is hereby set for trial on June 30, 1997 at 10:00 a.m. A modified pretrial order, which consists of agreed and disputed lists of trial exhibits, witnesses, and jury instructions, will be due **[**52]** on June 26, 1997. A Final Pretrial Conference will be held in chambers on June 27, 1997 at noon.

ENTER:

Ruben Castillo

United States District Judge

June 3, 1997

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The facts are derived from statements that the parties filed with this Court under the Northern District of Illinois' Local General Rule 12 (M)-(N). Rule 12(M)(3) requires a party moving for summary judgment to file a "statement of material facts as to which the moving party contends there is no genuine issue." The movant's statement must contain "specific references to affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth." Rule 12(M)(3). Cortese and Kajari's statement is cited as "Defs.' Facts P ." Similarly, Rule 12 (N)(3)(a) requires the non-moving party to file a concise response to the movants' statement including, in the case of any disagreement, specific references to supporting materials.

Spiegel's response is cited as "Pl.'s Facts P ." Rule 12 (N)(3)(b) authorizes the non-moving party to submit a statement of "additional facts that require the denial of summary judgment"; under Rule 12(M), the moving party may then submit a reply to the non-moving party's additional facts. Spiegel's statement of additional facts is cited as "Pl.'s Add'l Facts P " and the defendants' reply is cited as "Defs.' Resp. Add'l Facts P ." All properly-submitted material facts set forth in either party's statement (i.e., Defs.' Facts or Pl.'s Add'l Facts) are deemed admitted unless properly controverted. *See* Local Rule 12 (M) and 12(N)(3)(b); *see also Flaherty v. Gas Research Inst., 31 F.3d 451, 453 (7th Cir. 1994); Waldridge v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994); Stewart v. McGinnis, 5 F.3d 1031 (7th Cir. 1993).* Moreover, the mere denial of a particular fact without specific references to the "affidavits, parts of the record, and other supporting materials" is insufficient, and, where a properly supported factual assertion is met with such a naked denial, the fact may be deemed admitted. *Flaherty, 31 F.3d at 453.*

----------End Footnotes----------

---- **[**2]** n2 He mentioned in the police report that Cherny was sixty-one years old and that Bobin was fifty-seven years old, but the couple's ages were actually seventy-four and seventy-three, respectively. (Defs.' Facts P 4). Spiegel was thirty-six years old at the time. (*Id.* P 3).

----------End Footnotes----------

---- **[**5]** n3 Cherny explained that he and Bobin waited for nearly a month to file charges against Spiegel because they had no experience with the criminal justice system -- instead, they pursued informal remedies through the Condominium Association. (Cherny Dep. at 48). It was not until several weeks after the May 29th incident, when an employee of the

City of Chicago's Department of Aging advised Cherny and Bobin as to their legal rights, that they decided to file charges. (*Id.* at 50).

----------End Footnotes----------

[7]**

n4 Cherny also told Cortese that Spiegel had placed in Cherny and Bobin's mailbox a number of antagonistic notes complaining about other alleged noise-related disturbances. (Cherny Dep. at 80-82). He did not show Cortese the notes. Cherny said that the HTCA eventually directed Spiegel to make all future complaints to the building office and not to Cherny or Bobin. (*Id.* at 203).

----------End Footnotes----------

[8]**

n5 According to Cortese, an arrestee has the right to prove himself "not guilty"; he testified that had Spiegel done so, Cortese would not have arrested him. (Cortese Dep. at 132-34).

----------End Footnotes----------

[13]** n6 Section 1983 provides that any person who "subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law." *42 U.S.C. § 1983.* The Fourth Amendment to the United States Constitution states that a person shall not be arrested except upon a finding of probable cause.

----------End Footnotes----------

n7 We find no merit in Cortese's notion that Spiegel suffered from a guilty conscience. This guilty conscience theory is based on the assumption that Spiegel intentionally minimized Cherny's and Bobin's ages in the police report he filled out and then asked whether Cherny and Bobin had filed charges against him. First, the fact that Spiegel inaccurately estimated Cherny's and Bobin's ages does not warrant such a finding. Spiegel cannot be expected to know his neighbors' exact ages. He was still able to identify each of them as being more than twenty years older than he was. Moreover, construed in the light most favorable to Spiegel, the fact that Spiegel asked Kajari if Cherny and Bobin had filed charges related to the May 29th incident evidences a natural curiosity more than it does a guilty conscience.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

n8 Cortese provides no support for this proposition except that "it takes two to tango." As such, we do not address this argument.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

n9 We find no merit in Cortese's argument that Cherny and Bobin's reliability in reporting the May 29th 1993 incident is boosted by the HTCA's February 1993 resolution of Spiegel's noise complaints in their favor. While the results of the February hearing might bear on the validity of Spiegel's noise complaints, they say nothing at all about the sequence of events on May 29th or the accuracy of Cherny and Bobin's report on those events. Simply because Cherny and Bobin prevailed before the HTCA on the noise issue does not mean that they presented Detective Cortese trustworthy information about an entirely different incident in June. **[**25]**

n10 *Burns v. Cineplex Odeon, Inc., 1996 U.S. Dist. LEXIS 12886,* No. 95 C 5280, *1996 WL 501742,* at *5 (N.D. Ill. Sept. 3, 1996), which denied a motion to dismiss the plaintiff's false arrest claim, lends further support to our determination. The court in that case found that the officers had reason to suspect that the complainant bore a grudge based on a single argument that he had with the plaintiff over a parking space. Here, the case for a grudge is even stronger because the Spiegel-Cherny-Bobin noise dispute had been ongoing for several months.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - -n11 Cortese also argues that Cherny and Bobin were believable because they were forthcoming with two facts that could have cast them in a negative light: a history of conflicts with the Spiegels, and the fact that Spiegel was holding his son during the May 29th incident. But a jury is not required to find that their candor on these issues, which arguably hurt Spiegel more than Cherny and Bobin, rendered them reasonably trustworthy.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

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n12 Cortese claims that viewing Cherny's bruise and the picture of it taken right after the alleged battery constituted an investigation into independent evidence. However, as we pointed out earlier, the bruise and the photograph were not objective sources of evidence because they depend entirely the trustworthiness of Cherny's statements as to who caused the bruise and when the picture was taken.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - -n13 Cortese maintains that Spiegel would have been arrested regardless of whether he continued his investigation.

He claims that to upset a finding of probable cause, the evidence considered in hindsight must exculpate the arrestee. Once again, Cortese points to *Sevigny, 846 F.2d 953; Moore, 754 F.2d 1336;* and *Lusby, 749 F.2d 1423.* These cases fail to provide the support that Cortese seeks. None of these cases held that the information that would have been obtained through a more thorough investigation needed to be exculpatory--only that it may have been. *Sevigny, 846 F.2d at 958, Moore, 754 F.2d at 1345-46, Lusby, 749 F.2d at 1432.* While Cortese asks us to consider Hughes' testimony alone as proof of Spiegel's guilt, we must note that Hughes is not the only witness presented by Spiegel, and whether her testimony exculpates Spiegel is a question for the jury. To embark on such a task as comparing witnesses to find out whether or not the totality of the testimony would exculpate Spiegel would require the Court to judge the credibility of these witnesses. On a motion for summary judgment, however, the Court may not do so. *Anderson, 477 U.S. at 255, 106 S. Ct. at 2513-14.* Moreover, the witnesses and evidence available to Cortese here did, eventually, exculpate Spiegel. The same witnesses that Cortese suggests would not exonerate Spiegel testified at Spiegel's criminal trial, where he was acquitted of all charges.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - - **[**39]** n14 The court found that while the initial arrest was lawful, the evidence discovered by the police after the arrest did not warrant detaining the suspect for forty-two hours. *Llaguno, 763 F.2d at 1567.*

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

- - - - **[**40]** n15 As far back as 1986, the Seventh Circuit acknowledged that if there is reason to suspect that the complainant bears a grudge, the investigating officer is not

entitled to act on that person's complaint alone. *Gramenos, 797 F.2d at 439.*

----------End Footnotes----------

- **[**49]**

MARSHALL SPIEGEL, Plaintiff-Appellee, Cross Appellant, v. JOSEPH CORTESE, DETECTIVE, Defendant-Appellant, and JAMES HENNELLY and HOLLY ZIELKE, Defendants, Cross-Appellees.

Nos. 97-4113, 97-4236 & 98-1790

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2000 U.S. App. LEXIS 578

January 14, 2000, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No 95 C 3697. Ruben Castillo, Judge.

Original Opinion of November 1, 1999, Reported at: *1999 U.S. App. LEXIS 28126.*

JUDGES:

Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

OPINION:

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause on November 15, 1999, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

(2)

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

No. 99-1650

In the

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

DET. JOSEPH CORTESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court's refusal to afford an arresting officer qualified immunity on a claim that an arrest lacked probable cause is subject to independent review on appeal when the qualified immunity inquiry turns on application of legal principles and not a disputed issue of underlying historical fact.

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720 ILCS 5/12-3 (1998) 1

STATEMENT

On June 25, 1993, petitioner Marshall Spiegel was arrested by the respondent, Detective Joseph Cortese of the Chicago Police Department, and charged with battery. Tr. 6/30/97 at 181-87.[1] Det. Cortese made the arrest based upon a complaint by Loren Cherny ("Cherny"), petitioner's upstairs neighbor, who came to the police station where Det. Cortese was working and told him about an altercation that had occurred on May 29, 1993. Tr. 7/1/97 at 323-26. Cherny was accompanied by the woman he lives with, Min Bobin ("Bobin"), who was also present during the altercation. Tr. 7/1/97 at 523.

Cherny and Bobin, who were in their seventies, lived in a high-rise apartment building, Hollywood Towers, located at 5701 North Sheridan Road in the City of Chicago. Tr. 7/2/97 at 523. They moved into Apartment 8J in January 1993 and from the time they moved in, the neighbors in the apartment below them—petitioner and his wife, who lived in Apartment 7J—had complained that Cherny and Bobin were making too much noise. *Id.*; Tr. 7/1/97 at 293. At the time, petitioner was 36 years old, and his wife was 42. Tr. 6/30/97 at 121. Cherny and Bobin believed that the complaints were unjustified and

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[1] Battery is a Class A misdemeanor under Illinois law, pursuant to 720 ILCS 5/12-3 (1998), which provides in relevant part:

> (a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

they had complained to the condominium association that petitioner was harassing them. Tr. 7/2/97 at 524. The condominium association investigated and sided with Cherny and Bobin, finding that the complaints were unfounded. Tr. 7/2/97 at 525.

On May 29, 1993, at about 6 p.m., Carol Spiegel knocked on the door to Cherny and Bobin's apartment. Tr. 7/1/97 at 296; Tr. 7/2/97 at 527-28. She was upset about noise that was keeping her from taking a nap. Tr. 7/1/97 at 295. Petitioner also walked up the stairs from the seventh floor to the eighth floor, carrying his seventeen-month-old son, and stood at the staircase, about 10 or 12 feet from the Cherny and Bobin apartment door. Tr. 7/1/97 at 208-09; Tr. 7/2/97 at 527. Cherny and Bobin denied making noise, and suggested that the noise might be coming from further upstairs. Tr. 7/1/97 at 141, 297; Tr. 7/2/97 at 528. Carol Spiegel ran upstairs to check, then returned, and said that Bobin was a liar because no one was home in Apartment 9J. Tr. 7/1/97 at 141-43, 301; Tr. 7/2/97 at 528. Cherny and Bobin claimed that at that point petitioner had become very angry and came right up to Cherny, backing him against the wall; he told Cherny, "come on, hit me, you old fart." Tr. 7/2/97 at 530. Petitioner acknowledged that he had said this to Cherny. Tr. 7/1/97 at 140, 219. According to Cherny, petitioner was so close to him that his spittle sprayed Cherny's glasses. Tr. 7/2/97 at 530. Cherny also testified that petitioner kneed him on the inner thigh, producing a bruise that Cherny later showed Det. Cortese. Tr. 7/1/97 at 326, 367; Tr. 7/2/97 at 530-31. Petitioner and his wife testified that Cherny shoved petitioner but that petitioner did not hit, knee, or kick Cherny. Tr. 7/1/97 at 138, 140, 298. Meanwhile, Bobin had turned to try to reenter

their apartment, but she discovered that they had locked themselves out. Tr. 7/1/97 at 384-85; Tr. 7/2/97 at 530.

During the incident a neighbor, Hanan Hughes ("Hughes"), heard the yelling and came out of her apartment into the hallway. Tr. 7/1/97 at 266. She called out to ask if everything was all right. Tr. 7/1/97 at 271. Hughes testified that the Spiegels, Cherny, and Bobin were all yelling back and forth during the incident. Tr. 7/1/97 at 270. She came out because she is a nurse and was concerned that Cherny, an old man, might have a heart attack. Tr. 7/1/97 at 272. Hughes saw Cherny push petitioner and heard Cherny say, "You shouldn't have tried to kick me." Tr. 7/1/97 at 271. Petitioner also turned toward Hughes and said: "You see what happens when you let Jews move into the building." Tr. 7/1/97 at 141, 273, 302; Tr. 7/2/97 at 530-31. The doorman, who had been called to the scene by another neighbor, then herded the Spiegels back toward their apartment and told Bobin she could get a key from downstairs to reenter her apartment. Tr. 7/2/97 at 530-31. Petitioner testified that he told the doorman that he was embarrassed that fellow Jews would act this way. Tr. 7/1/97 at 223.

On May 31, 1993, petitioner filed a police report at the 10th District police station in which he alleged that during the May 29th dispute, Bobin and Cherny both shoved him. Tr. 6/30/97 at 147-48. On June 21, 1993, petitioner went to the Area Three police station and told Sgt. Kajari that he wanted to file charges against Cherny and Bobin. Tr. 6/30/97 at 157-58. On June 23, 1993, petitioner returned to the Area Three police station and swore out a complaint against Cherny and Bobin for battery, based upon the May 29th incident. Tr. 6/30/97 at

160-61. Petitioner testified that the warrant clerk told him that he would mail summonses to Cherny and Bobin. Tr. 6/30/97 at 163.

Cherny and Bobin went to the police station on June 25 to file a report on the May 29 incident. Tr. 7/1/97 at 323. Sgt. Kajari assigned Det. Cortese to investigate that report. Tr. 7/1/97 at 323. Det. Cortese interviewed Cherny and Bobin on June 25. Tr. 7/1/97 at 323. They told Det. Cortese that the Spiegels had knocked on their door at about 6:00 p.m., and when they opened it, Carol Spiegel began screaming at them about the noise that she claimed was coming from their apartment. Tr. 7/1/97 at 383-84; Tr. 7/2/97 at 527-28. Petitioner, holding his child, moved close to Cherny's face and dared Cherny to hit him. Tr. 7/2/97 at 530. Petitioner then struck Cherny on the inner thigh with his knee. Tr. 7/2/97 at 530-31. Cherny and Bobin told Det. Cortese that they were frightened of petitioner. Tr. 7/1/97 at 388. When Cherny spoke to Det. Cortese, he showed him photographs of his bruised thigh that were taken soon after the incident, as well as the bruise itself, Tr. 7/1/97 at 370, 386, 447; Tr. 7/2/97 at 539-41. Cherny also gave Det. Cortese a report that Bobin had written describing the incident to the condominium association. Tr. 7/1/97 at 335-36; Tr. 7/2/97 at 536. Det. Cortese testified that he believed Cherny and Bobin, as did Det. Hennelly, the other officer who was present when Det. Cortese interviewed Cherny and Bobin. Tr. 7/2/97 at 452.

Det. Cortese then reviewed petitioner's May 31 police report and learned that there had been an ongoing dispute between the Spiegels and Cherny and Bobin, and that petitioner had claimed that Cherny and Bobin had

shoved and threatened him on May 29. Tr. 7/1/97 at 321, 332-34. He also reviewed documents Cherny and Bobin had provided to him reflecting complaints each side had made about the other to the condominium association. Tr. 7/1/97 at 335, 340, 380-82.

Later, on June 25, Det. Cortese called the Spiegel residence and spoke to Carol Spiegel, who said that petitioner was not there. Tr. 6/30/97 at 166-67; Tr. 7/1/97 at 304-06, 390-91. Det. Cortese told her that it was urgent that he speak to petitioner, and that if petitioner did not call him he would be arrested, but he did not question Carol Spiegel about the incident. *Ibid.* Soon, petitioner called back, and Det. Cortese told him that Cherny had charged him with battery, that he was subject to arrest, and that he should come to the station to post bond. Tr. 6/30/97 at 168-70. Petitioner told Det. Cortese that he had filed charges two days earlier against Cherny and Bobin, and that Cherny's charges against him were merely retaliatory. Tr. 6/30/97 at 170-72. He added that Cherny and Bobin had shoved him and that there were witnesses who would support his version of events, although he did not identify the witnesses. *Id.* at 175; Tr. 7/1/97 at 259. Det. Cortese, then advised petitioner of his rights and told him to get a lawyer. Tr. 6/30/97 at 176. Petitioner then asked to speak to Sgt. Kajari, to whom he repeated his version of events. Tr. 6/30/97 at 167-68. Sgt. Kajari said that he would not interfere with Det. Cortese's investigation. Tr. 6/30/97 at 169, 177-78.

Petitioner hired a criminal defense lawyer, Patrick Tuite ("Tuite"), to represent him in the criminal case. Tr. 6/30/97 at 180. Later that day, Tuite telephoned Det. Cortese and told him that petitioner would provide no

more information to the police. Tr. 7/1/97 at 393. Petitioner and Tuite then went to the police station, and he was arrested for battery. Tr. 7/1/97 at 402-04.

Petitioner was acquitted of the charge against him after a trial by jury. See Pet. App. 6a. Petitioner then brought suit pursuant to 42 U.S.C. § 1983 against Det. Cortese, four other Chicago police officers, and an employee of Chicago's Department of Aging, as well as the City of Chicago itself, alleging that the individual defendants participated in his arrest without probable cause in violation of the Fourth Amendment and that the arrest was conducted pursuant to an unconstitutional policy or custom of the City of Chicago. See Pet. App. 3a. The district court dismissed petitioner's claims against four of the individual defendants, as well as his claims against the City itself, but refused to dismiss the claims against Det. Cortese and Sgt. Kajari. See Pet. App. 19a-35a. Sgt. Kajari and Det. Cortese subsequently moved for summary judgment on the basis of qualified immunity, but that motion was denied. See Pet. App. 62a-67a.

The case was tried to a jury, which returned a verdict in favor of Sgt. Kajari but against Det. Cortese in the amount of $5,000. R. 60, 61, 62. In his post-trial motion, Det. Cortese sought judgment as a matter of law based on qualified immunity, but the district court again rejected that defense. See R. 75.

The court of appeals reversed. After observing that a district court's ruling on qualified immunity should be reviewed de novo on appeal (Pet. App. 9a), the court observed that "qualified immunity applies not only to those officials who correctly determine that probable cause to arrest exists, but also to those governmental

officials who reasonably but mistakenly conclude that it does." Pet. App. 10a. The court added: "In this context, the law tolerates reasonable error because 'officials should not err always on the side of caution because they fear being sued.'" *Ibid.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). In this case, the court concluded that an arresting officer could have reasonably concluded that there was a sufficient basis to arrest petitioner based on Cherny's statements, under the general rule that an allegation from one who claims to have been the victim of a crime supplies probable cause, see Pet. App. 10a-11a, and here, "Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and the account of the escalating conflict with Spiegel provided ample grounds for Cortese to believe that Spiegel had committed battery," Pet. App. 11a. While the court acknowledged that the petitioner had adduced evidence that impeached the credibility of Cherny and Bobin, the court concluded that a reasonable officer could properly have determined that these issues of credibility did not, as a matter of law, negate the existence of probable cause to arrest. See Pet. App. at 12a-13a. Instead, the court reasoned it was settled law that "[t]he credibility of a putative victim or witness is a question, not for police officers in the discharge of their considerable duties, but for the jury in a criminal trial." Pet. App. 13a.

ARGUMENT

Petitioner's submission rests entirely on the jury's verdict that Det. Cortese lacked probable cause to arrest him. He argues: "Once the jury made its factual findings and determined that there was no probable cause to

arrest petitioner, the reviewing court could not revisit that determination *de novo*, and simply substitute its own conclusion for the jury's verdict." Pet. 7. That submission is easily answered by reference to two settled principles: first, the question of qualified immunity is one of law for the court rather than the jury to decide; and second, when the court of appeals must determine whether a constitutionally mandated evidentiary threshold has been satisfied—such as whether probable cause exists to support an arrest—the court must engage in independent appellate review. Accordingly, the court of appeals properly engaged in independent review here when deciding whether the facts confronting Det. Cortese could have led a reasonable police officer to believe that he had probable cause to arrest petitioner—the touchstone for qualified immunity.

Petitioner is correct that when a case turns on some underlying disputed issue of historical fact, rather than the question whether the constitutionally mandated evidentiary threshold has been surmounted, deference to the trier of fact is warranted. But here petitioner has not identified any underlying dispute of historical fact on which the court of appeals failed to defer to the jury's verdict. For that reason, the judgment below was correct, and in any event presents no question warranting plenary review.

1. As this Court has explained, when evaluating the scope of appellate review, there is a critical difference between a determination of historical fact and a determination whether a quantum of evidence meets the constitutional standard. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996); *Thompson v. Keohane*, 516 U.S.

99, 111-16 (1995). Findings of pure historical fact are reviewed deferentially on appeal, e.g., *Ornelas*, 517 U.S. at 699, but whether a constitutionally mandated evidentiary threshold is satisfied is reviewed de novo, e.g., *id.* at 696. In *Ornelas*, for example, this Court confronted the same question that was before the jury here—the existence of probable cause to make a search or seize a person—and held that "[i]ndependent review [is] . . . necessary if appellate courts are to maintain control of, and to clarify legal principles." *Id.* at 697. This case illustrates the Court's point. The dispositive legal question here is whether police officers may make arrests based on the accounts of a putative victim even when there are factors present that tend to impeach the victim's credibility. That is surely an issue on which uniform guidance from appellate decisions is critical. Under *Ornelas*, then, Det. Cortese was entitled to independent appellate review of the jury's probable cause determination.

The justification for independent appellate review is especially clear in a case such as this, where the question the court of appeals actually decided was the separate legal issue whether Det. Cortese was entitled to qualified immunity for his probable cause determination. As this Court has repeatedly held, an official is entitled to this second layer of protection, even when the plaintiff's constitutional rights have been violated, unless his conduct was objectively unreasonable in light of then-prevailing law. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Qualified immunity will therefore protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986)—not merely those who have not violated the plaintiff's rights.

Accordingly, even if the court of appeals were prepared to announce a new rule forbidding arrests when there are reasons to doubt a complaining witness's credibility, qualified immunity prevents imposition of liability simply because an arresting officer failed to anticipate the creation of that rule.

Indeed, qualified immunity plays a particularly important role in the context of probable-cause determinations. That is because the standard for probable cause is "not readily, or even usefully, reduced to a neat set of legal rules." *Ornelas*, 517 U.S. at 695 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). And "because the mosaic which is analyzed for a . . . probable-cause inquiry is multifaceted, 'one determination will seldom be a useful 'precedent' for another.'" *Id.* at 698 (quoting *Gates*, 461 U.S. at 238 n.11) (citation omitted). Thus, officers will frequently confront circumstances in which they can reasonably entertain doubt about whether a reviewing court will find probable cause to be present. Where such doubt exists, qualified immunity is available. For example, in *Hunter v. Bryant*, this Court expressly held that arresting officers "who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641).[2]

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[2] On this basis, every circuit has concluded since *Hunter* that qualified immunity is available against claims of arrest without probable cause where the arresting officers can demonstrate that their probable-cause determinations were not unreasonable under then-existing law. See, e.g., *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000); *Martinez v. Simonetti*, 202 F.3d 625, 634-36 (2d Cir. 2000); *Fletcher v. Town of Clinton*, 196 F.3d 41, 53 (1st Cir. 1999); *Wollin v. Gondert*, 192 F.3d 616, 620

(continued...)

Qualified immunity, it is settled, presents a question of law for the court to review de novo. See, e.g., *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Indeed, that was the standard employed by this Court when evaluating qualified immunity in *Hunter*. See 502 U.S. at 228. That standard makes good sense here. The defense of qualified immunity presented here required the court to determine whether Det. Cortese's decision to arrest petitioner was reasonable in light of established law. Of course, a jury will have no competence to evaluate an officer's decision to make an arrest in light of then-established law; and that supplies even more reason for independent appellate review than was present in *Ornelas*. Accordingly, the court of appeals properly refused to defer to the jury's determination on probable cause when assessing the defense of qualified immunity.

2. For his part, petitioner says not a word about *Ornelas*, concedes that the question whether a defendant is entitled to qualified immunity is an issue of law for a court to consider on appeal de novo (Pet. 9), and contends only that deference to the trier of fact is required "if the nature of the conduct is disputed." *Ibid.* We have no quarrel with that portion of petitioner's submission. As

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[2] (...continued)
(7th Cir. 1999); *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998); *Greene v. Reeves*, 80 F.3d 1101, 1105 (6th Cir. 1996); *Habiger v. City of Fargo*, 80 F.3d 289, 295-97 (8th Cir.), cert. denied, 519 U.S. 1011 (1996); *Albright v. Rodriguez*, 51 F.3d 1531, 1534-37 (10th Cir. 1995); *Gibson v. Rich*, 44 F.3d 274-277 (5th Cir. 1995); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994); *Wardlaw v. Pickett*, 1 F.3d 1297, 1304-05 (D.C. Cir. 1993), cert. denied, 512 U.S. 1204 (1994); *Act Up! / Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

we explain above, *Ornelas* acknowledges that when there are underlying disputes of historical fact, the resolution of those disputes by the trier of fact is entitled to deference on appeal. Here, however, petitioner fails to identify any such disputes. The court of appeals did not question petitioner's account of the underlying historical facts; indeed, it acknowledged each of the factors that petitioner claimed impeached the credibility of the individuals who had accused him of battery. See Pet. App. 11a-13a. The court simply concluded that these doubts about credibility did not establish that Det. Cortese acted unreasonably in light of then-settled law when he concluded that these questions of credibility were properly left for trial and did not negate his authority to make an arrest. Petitioner does not even quarrel with this legal principle.

Petitioner's failure to identify any dispute of historical fact that was material to the decision below, or any respect in which the court of appeals failed to credit any of the evidence he adduced, is fatal to his claim of error here.[3] In fact, the decisions on which petitioner relies to suggest that there is a conflict in the circuits on the deference to be granted to the trier of fact in qualified-immunity cases are readily reconciled with the decision below precisely because those cases involved disputes of underlying historical fact that had been resolved by the trier of fact adversely to the defendant. See *Acosta v. City*

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[3] Indeed, when considering the defense of qualified immunity, the Seventh Circuit has acknowledged the distinction between disputes of historical fact and claims based on the existing state of the law. See *Humphrey v. Staszak*, 148 F.3d 719, 725-28 (7th Cir. 1998).

& County of San Francisco, 83 F.3d 1143, 1146-48 (9th Cir.) (numerous disputes about what occurred before officer shot at decedent), cert. denied, 519 U.S. 1009 (1996); *Karnes v. Skrutski*, 62 F.3d 485, 494-95 (3d Cir. 1995) (disputed facts involved what defendant officers knew prior to arrest); *Posr v. Doherty*, 944 F.2d 91, 96 (2d Cir. 1991) (officers' account of arrest was disputed by other witnesses). See also *Street v. Parham*, 929 F.2d 537, 540-41 & n.2 (10th Cir. 1991) (no discussion of whether underlying disputes of historical fact were present).[4] Thus, there is neither error nor conflict between the circuits here.

3. Petitioner also suggests that this case presents the question that the court granted certiorari to review in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1493 (1999). Snyder, however, presented no question of the scope of appellate review, since in that case both the question whether the defendant officers were guilty of excessive force and the question whether they were entitled to qualified immunity were submitted to the jury, and the court of appeals chose to

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[4] The same point disposes of petitioner's reliance on *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), a prior Seventh Circuit decision, in which the court deferred to the trier of fact's determination on underlying disputes of historical fact. See *id.* at 886-87. In fact, the Seventh Circuit has expressly limited *Frazell* to cases involving disputes of historical fact. See *Humphrey*, 148 F.3d at 725-26. The other Seventh Circuit case on which petitioner relies appears to be infected by the Seventh Circuit's prior view that probable-cause determinations should be reviewed deferentially on appeal, a view that this Court rejected in *Ornelas*. See *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434-36 (7th Cir. 1993).

reconcile apparently inconsistent verdicts in favor of qualified immunity. See *id.* at 801.[5] Indeed, *Snyder* is doubly distinguishable because it involved an excessive-force claim rather than a probable-cause claim, and for that reason at least arguably did not fall within the scope of review required by *Ornelas*. Accordingly, even if this Court ultimately decides to review another case that presents the question that the Fifth Circuit acknowledged in *Snyder* had divided the circuits—whether a jury's finding of excessive force will necessarily preclude the defense of qualified immunity—this case is not an appropriate vehicle for resolving that dispute.[6]

In fact, *Snyder* itself involved significant disputes of underlying historical fact. See 142 F.3d at 794. Here, however, as we explain above, petitioner cannot identify any dispute of historical fact on which the court of appeals failed to defer to the verdict, nor can he identify any manner in which the court of appeals failed to credit any of the evidence that he adduced at trial. Thus, even if *Snyder* were incorrectly decided, that error casts no doubt on the holding below.

Finally, even petitioner does not contend that questions of qualified immunity must be reviewed deferentially on

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[5] Indeed, the two questions presented for review in the petition for certiorari in *Snyder* both involved the manner in which apparently inconsistent jury verdicts should be resolved. See Original Brief of Petitioner at I, *Snyder v. Trepagnier*, No. 98-507 (Feb. 25, 1999).

[6] In *Snyder*, the court of appeals acknowledged that other circuits had "take[n] the position that a finding of excessive force precludes a finding of qualified immunity." 142 F.3d at 801 n.10.

appeal absent some underlying dispute of historical fact; instead, he acknowledges that qualified immunity is ordinarily a question of law for the court to decide de novo, with the jury limited to "decid[ing] disputed factual issues relevant to that determination." Pet. 9. Thus, at most, the dispute here, unlike in *Snyder*, is quite narrow—whether this record reflects some underlying issue of historical fact on which the court of appeals failed to defer to the verdict. That limited and heavily fact-bound question plainly does not present any issue of widespread significance warranting this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1650

In the

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

-versus-

DETECTIVE JOSEPH CORTESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

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Respondent's panicky Brief in Opposition, submitted though none was required, argues that:

1. Based upon Ornelas v. United States, 517 U.S. 690 (1996), the Court of Appeals "properly refused to defer to the jury's determination on probable cause when assessing the defense of qualified immunity";[1]

2. In any event, the Court of Appeals was justified in not deferring to the jury's verdict in favor of Petitioner on the probable cause issue because it supposedly "did not question petitioners's account of the underlying historical facts"; [2] and

3. The cases upon which Petitioner relies, including Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998), cert. dismissed, 119 S. Co. 1493 (1999), are distinguishable "because those cases involved disputes of underlying historical fact that had been resolved by the trier of fact adversely to the defendant."[3]

As set forth more fully below, Respondent's argument is based upon a false premise. The case at bar most certainly did involve at the trial level disputes of fact which were resolved by the jury adversely to Respondent. The Court of Appeals simply replaced that resolution with its own contrary determination when it found that the Respondent was entitled to qualified immunity based upon the existence of probable cause, after the jury had found that there was no probable cause. Finally, Ornelas is a criminal case involving a judge's findings on a motion to suppress, and therefore has little or no relevance to a determination of qualified immunity in a

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[1]Brief in Opposition and 11.

[2]Id. at 12.

[3]Id.

civil rights case involving a jury verdict directly opposed to the grant of qualified immunity.

1.APPLYING A STANDARD OF OBJECTIVE REASONABLENESS, THE JURY DECIDED NUMEROUS FACTUAL DISPUTES IN FAVOR OF PETITIONER AND AGAINST RESPONDENT, AND BASED UPON THOSE DECISIONS FOUND THAT THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE.

There is no dispute that the jury in the case at bar applied a standard of objective reasonableness in deciding the probable cause issue. See Petition at 8, n. 5. See also, Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989) (Fourth Amendment "reasonableness" measured by objective standard). Therefore, in returning its verdict the jury necessarily decided that an objectively reasonable police officer would not have believed that Petitioner's arrest was supported by probable cause. See, eg., Mahoney v. Kescry, 976 F.2d 1054, 1058-59 (7th Cir. 1992).

In reaching this conclusion, viewing the evidence in the light most favorable to Petitioner, the jury rejected the notion that Cherny's statement to Respondent, that Cherny had been struck by a man 37 years his junior, was sufficient to establish probable cause. The jury also rejected Respondent's contention that the bruise Cherny displayed provided adequate justification. Nor, according to the jury, was Cherny's account of his escalating conflict with Petitioner a sufficient basis. The jury considered these contentions by Respondent alone and in combination, and found them wanting.

The district court's Memorandum Opinion and Order denying Respondent's motion for summary judgement, included in the Appendix to the Petition at 39a-73a, documents additional factual disputes that the jury resolved

in Petitioner's favor. For example, Respondent denied that he had reason to question the allegations of Cherny and Bobin on the ground that they harbored animosity toward Petitioner because, according to Respondent, the evidence did not establish that Cherny and Bobin had such animosity. (App. 50a). Again, looking at the evidence in the light most favorable to Petitioner, the jury obviously found that Cherny and Bobin did harbor such animosity toward Petitioner.
Another example is found in Respondent's argument that the evidence did not establish that Cherny and Bobin filed their police report and criminal charges in retaliation for Petitioner having filed his police report and criminal charges against them. (App. 52a). The jury found that the actions of Cherny and Bobin were retaliatory.

There are many others, but these examples amply demonstrate that Respondent is dead wrong when he argues to this Court that the case at bar does not involve disputes of historical fact which were resolved by the jury adversely to Respondent.[4] (Brief in Opposition at 12).

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[4]Perhaps the source of the error is that Respondent's present counsel did not try the case, as Petitioner's counsel did. Not having actually tried the case results in basic gaps in Respondent's counsel's knowledge of the facts. For example, Respondent's Brief repeats a factual error contained in the Seventh Circuit's opinion: both state that Petitioner was acquitted in state court of the criminal charge against him "after a trial by jury." (Brief in Opposition at 6). This is simply not true: Petitioner was acquitted after a bench trial. (See Supplemental Appendix attached to this Reply). Such a fundamental ignorance of the facts renders suspect Respondent's assertions concerning the underlying facts of the case.

2. IN GRANTING QUALIFIED IMMUNITY, THE COURT OF APPEALS IGNORED THE JURY'S VERDICT, AND SIMPLY SUBSTITUTED ITS OWN VIEW OF THE FACTS BY DECIDING THAT THE ARREST WAS SUPPORTED BY PROBABLE CAUSE.

Respondent concedes throughout his Brief in Opposition that the Court of Appeals did not in any fashion defer to the jury's verdict. (Brief in Opposition at 9, 11).

In fact, the Court of Appeals ignored the jury's verdict and substituted its own view of the facts to conclude that the arrest was supported by probable cause. The Court of Appeals, which of course did not hear any evidence, nevertheless held, directly contrary to the jury's verdict, that:

> Cherny's statement to Cortese that he had been struck by a man 37 years his junior, the bruise he displayed and his account of the escalating conflict with Spiegel together provided ample grounds for Cortese to believe that Spiegel had committed a battery.

(App. 11a). Not a word is mentioned about the jury's verdict.

Further proof that, contrary to Respondent's assertion in his Brief, the Court of Appeals did "question" the jury's findings regarding the historical facts is contained in the passage in its opinion where "these purported facts" are dismissed as "either irrelevant... or insignificant..." (App. 12a). The problem with the Court's opinion is that the jury, which viewed each of the witnesses to the incident, found the facts to be established and not merely "purported," and also found them to be relevant and significant. The Court of Appeals simply usurped the role of the jury.

When there has been a jury verdict resolving disputed facts, as in the case at bar, the scope of de novo review is limited to determining whether the verdict is sufficient as a matter of law. See, eg., F.R.Civ. P.50. It is axiomatic that in this context a court must view the evidence in the light most favorable to the party obtaining the verdict. And that verdict may not be disturbed unless the court finds that no reasonable jury could have reached that conclusion. The Court of Appeals in the case at bar did neither of these. Petitioner in reality received two trials in this case. One was in the district court before a jury, which was proper and which Petitioner won. The second was in the appellate court before three judges, which was improper. De novo appellate review does not ever properly involve a new trial.

II. RESPONDENT'S BRIEF ONLY SERVES TO HIGHLIGHT THE CONFLICT EXISTING AMONG THE CIRCUITS REGARDING THE PROPER STANDARD FOR DETERMINING QUALIFIED IMMUNITY IN THE FOURTH AMENDMENT CONTEXT, WHEN THERE IS NO DISPUTE THAT THE LAW IS CLEARLY ESTABLISHED AND A JURY HAS ALREADY DETERMINED THAT THE DEFENDANT'S ACTIONS WERE OBJECTIVELY UNREASONABLE.

Having demonstrated that the jury in the case at bar did resolve historical facts underlying the issue of qualified immunity adversely to Respondent, and that the Court of Appeals acted directly contrary to that verdict in granting qualified immunity, we arrive at the pivotal issue of what is the proper standard for determining qualified immunity in the Fourth Amendment context when there is no dispute that the law is clearly established.[5]

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5 "It is undisputed that the constitutional right to be free from

The better view, the one adopted by the majority of the cases as cited in the Petition, is that the court is "bound by the jury's resolution of disputed factual issues in assessing [the defendant's] immunity defense." Frazell v. Flanigan, 102 F.3d 877, 886 (7th Cir. 1996).

> Yet in addition to that, a number of circuits have indicated that a jury's finding on the Fourth Amendment question effectively resolves the immunity issue as well, because both questions turn on whether the officer's conduct was objectively reasonable under the circumstances. Those circuits reason that once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful.

Id. at 886-87[6]

This view is also succinctly stated by the Seventh Circuit in Mahoney v. Kescry, supra, 976 F.2d at 1058-59:

> If the issue of the adequacy of the grounds for the arrest is the same in the immunity inquiry and on the merits of the false-arrest charge, then unless some legal rule or standard bearing on probable cause has changed since

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arrest without probable cause was clearly established at the time Spiegel was arrested in 1993." (App. 10a).

[6] reasonable mistakes is built into the concept of "probable cause." Illinois v. Gates, 462 U.S. 213, 103 S. CT. 2317 (1983).

> the arrest, the jury's determination that there was or was not probable cause will automatically resolve both immunity and the merits.

(Emphasis added).

See also, Moore v. The Marketplace Restaurant, 754 F.2d 1336, 1357 (7th Cir. 1985) (Posner, J., concurring) (qualified immunity depends on whether police had probable cause to arrest); Maxwell v. City of Indianapolis, 998 F.2d 431, 435-36 (7th Cir. 1993) (question of probable cause in unlawful arrest cases is indistinguishable from the qualified immunity issue); Petition at 13-18 (collecting cases from other Circuits).

Respondent, in his last stand, claims that these cases are rendered obsolete by this Court's decision in Ornelas. It is telling that Respondent cannot point to any authority involving civil rights cases and/or qualified immunity defenses.[7] Instead, he desperately seeks to transform a criminal case, involving a judge's finding in the context of a motion to suppress, into relevant precedent.

Ornelas is limited to criminal cases in its facts, its text, and its rationale. This Court held that after a hearing on a motion to suppress, independent appellate review of a trial judge's "ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases." Ornelas v. United States, supra, 517 U.S. at 697. Each of the cases cited is a criminal case involving a motion to suppress. This Court then held that a trial court's "ultimate determinations" in ruling upon a motion to suppress are to be reviewed on appeal de novo.

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[7]Ornelas for the qualified immunity propositions that Respondent advances

Nor, despite Respondent's best efforts, does the rationale underlying Ornelas translate into the civil rights area. It makes sense that "appellate courts are to maintain control of, and to clarify, the legal principles" regarding probable cause in criminal cases where that is the precise issue. It does not make sense that civil rights cases would be the medium to do so, where the issue is not probable cause per se but that of qualified immunity. Far from playing a "particularly important role" in developing the legal principles regarding probable cause, qualified immunity bears at best only tangential relevance because it involves other issues (for example, whether the law was clearly established), and probable cause is only one component.

Even if Ornelas were applicable to qualified immunity determinations in civil rights cases, that would not help Respondent in the case at bar. Ornelas clearly holds that "findings of historical fact" are reviewed "only for clear error." Id. at 699. As noted above, the Court of Appeals did not do that in the case at bar. Nor did the Court give "due weight" to the jury's findings regarding the credibility of witnesses and the inferences to be drawn from those findings. Id. at 700.

The fact that Ornelas is not applicable is confirmed by the action of this Court on January 15, 1999, long after Ornelas was decided, in granting the petition for certiorari in Snyder v. Trepagnier, No. 98 507, on the following question: whether a jury finding that a fourth amendment constitutional violation occurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity? This is exactly the same question posed in the case at bar.[8] By

[8]Respondent's argument that the cases are distinguishable because Snyder "involved an excessive - force claim rather than a probable-cause claim "betrays a fundamental lack of understanding of this issue. Both excessive force and probable cause are fourth amendment violations which are judged by a standard of objective reasonableness. Therefore, for purposes of the question presented, it makes absolutely no difference

granting the petition in Synder, this Court recognized the importance of the question to the development of civil rights law and existence of the conflict. The conflict still exists, the question is still important and recurring, and the need for this Court's guidance is even greater now than it was last year.

The case at bar presents the identical question upon which this Court granted certiorari in Snyder. The question retains its significance because it is a recurring one and the Courts of Appeal have been unable to agree on a uniform approach to it. Therefore, the Petition should be granted to address this important civil rights issue and provide the necessary guidance to the lower courts.

Respectfully submitted,

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which fourth amendment claim is involved.

THE CLERK: Marshall Spiegel.
MR. TUITT: Judge, Pat Tuitt on behalf of Mr. Spiegel. We were and still are ready for trial.
MR. SEIDNER: We are ready to proceed. And this will be a bench trial, Judge.
THE COURT: Get all of the witnesses up here so we can swear them in.
(Witnesses duly sworn.)
THE COURT: Mr. Spiegel, your are waiving your right to a jury trial?
MR. SPIEGEL: Yes, I am, on the advice of Counsel.
THE COURT: Do you know what a jury is?
MR. Spiegel: Yes.
MR. TUITT: The Defendant has signed a jury waiver.
TE Court: All right. The Jury Waiver. The plea is not guilty.